IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; and CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,

Petitioners,

vs.

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on this proceeding on December 14, 1977.

OPINION AND JUDGMENT BELOW

The opinion of rehearing (including dissent) of the United States Circuit Court of Appeals for the Ninth Circuit is

printed as Appendix A, p. 1, and is reported in *Van Davis, et al. v. County of Los Angeles, et al.*, 566 F.2d 1334 (9th Cir. 1977). The unreported original opinion of the circuit court is printed as Appendix B. The judgment and findings of the district court are printed as Appendices C, and D, respectively.

JURISDICTION

The opinion and judgment were entered on December 14, 1977. A timely petition for rehearing was filed by the respondents, *Van Davis, et al.* (plaintiffs-appellants below), and was denied on January 30, 1978.

Jurisdiction of the District Court was based on 28 U.S.C. Sec. 1343.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1), and Rule 19(1)(b).

QUESTIONS PRESENTED

1. Is proof of purposeful racial discriminatory intent required to establish a cause of action for employment discrimination under 42 U.S.C. Sec. 1981 or can an employer be held liable for pre-Title VII employment practices under Sec. 1981, merely by a showing of disproportionate impact.

2. Is a racial quota hiring order to be effective until the entire fire department achieves current racial parity with the general population beyond the jurisdiction of the court when:

a. The District Court expressly found no discriminatory intent was present;

b. The quota hiring order attempts to remedy hiring practices occurring prior to the effective date of Title VII and time barred by the applicable 3-year Statute of Limitations on Sec. 1981 actions;

c. The plaintiffs had no standing to represent any pre-March 24, 1972 applicants and no discriminatory hiring has occurred subsequent to Title VII's effective date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The 5th and 14th Amendments to the United States Constitution; in particular, the due process and equal protection clauses thereof;

2. The following provisions of the United States Code:

> 42 U.S.C. Sec. 1981. Equal rights under the law:
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and extractions of every kind, and to no other.

42 U.S.C. Sec. 2000e, et seq. (Title VII of the Civil Rights Act of 1964 as amended in 1972).

STATEMENT OF THE CASE

In this proceeding, the County of Los Angeles was found liable for employment discrimination under 42 U.S.C. Sec. 1981 and Title VII and ordered to engage in quota hiring of blacks and Mexican-Americans until the entire fire department of 1760 firefighters achieved racial parity with the County's general population, despite the existence of the following facts:

1. No discriminatory hiring occurred after the effective date of Title VII;

2. The trial court found that the County had not engaged in purposeful discrimination and, to the contrary, found that the County had engaged in efforts designed to increase minority representation in the fire department;

3. None of the plaintiffs had been applicants for any firefighter position prior to 1972, and the Ninth Circuit held that the plaintiffs lacked standing to challenge the County's use of qualification tests given at any time prior to 1972;

4. All plaintiff applicants taking the 1972 written exam passed, and all hiring from the resulting eligibility list was conceded by plaintiffs prior to trial to be accomplished in a non-discriminatory manner.

The plaintiffs in their complaint filed on January 11, 1973 challenged two written employment tests of the County of Los Angeles - one given in 1969 and the other in 1972. While also claiming the 5'7" minimum height standard was discriminatory, they expressly declined to seek an injunction against its use in both the district and circuit courts. None of the plaintiffs was disqualified by the minimum height standard. In an amended complaint the plaintiffs conceded that the hiring as a result of the 1972 test was not discriminatory. Ultimately the Ninth Circuit in the decision sought to be reviewed by this petition held that the plaintiffs had no standing to challenge the 1969 written tests or any hiring practices occurring before 1972. The following summarizes the proceedings in the case.

In July, 1973, the trial court found that petitioner County of Los Angeles had violated 42 U.S.C. Secs. 1981, 1983, and Sec. 2000e-16 (Title VII) by administering a written employment qualification test for entry-level firefighter in 1969, and January, 1972, which had an adverse effect on blacks and Mexican-Americans and was not shown to be job-related. The District Court upheld the departments 5'7" minimum

height standard. The court further found that neither the defendants nor their officials had engaged in employment practices with a wilfull or conscious purpose of excluding blacks and Mexican-Americans from employment, but to the contrary, had engaged in efforts designed to increase minority representation in the Fire Department. App. D, p. 4. As a remedy, the court ordered that the County hire all future entry-level firemen in accordance with a hiring quota of 20% black and 20% Mexican-American until such time as the percentage representation of those minorities in the entire Fire Department in all ranks equaled their representation in the County's general population.1/

The only named plaintiffs in this case were individuals who had applied for and taken only the 1972 written examination and who were certified on a hiring list from that exam which was conceded by plaintiffs to have been prepared and utilized in a non-discriminatory manner. No individual who had been unsuccessful on the 1969 or any prior exam was named as a plaintiff, nor did the plaintiffs seek to represent such prior applicants, the complaint alleging that it was filed only on behalf of "blacks or Mexican-Americans" who are current or future applicants for employment as Los Angeles County Firemen. (Clerks Transcript, lines 20-24, p. 62.)

1/ At the time of judgment, blacks and Mexican-Americans comprised 0.5% and 3% respectively of the Fire Department's firefighter personnel (approximately 1762) and 10.9 and 18.3% of the County's general population.

On appeal, the United States Court of Appeals for the Ninth Circuit, in its original decision, reversed the judgment under Sec. 1983 because the County was not a "person," and affirmed the judgment finding the County in violation of Sec. 1981. The court found no violation of Title VII because the tests administered in 1972 had not been implemented; that is, no civil service list was promulgated or hires made as a consequence of the test results. Nevertheless, the court ruled that Title VII standards were applicable to Sec. 1981 claims and that a violation of Sec. 1982 could be established merely by a showing that a hiring practice had a disparate effect on minorities and the employer was unable to validate the test as job-related. The circuit court reversed the trial court's judgment upholding petitioner's 5'7" minimum height standard and remanded for reconsideration of the quota.

Subsequent to its original decision, the Ninth Circuit, upon petitioner's request, granted a rehearing to determine, in light of this Court's recent decision in *Washington v. Davis*, 426 U.S. 229 (1976), whether proof of purposeful discriminatory intent is required for a violation of Sec. 1981. On rehearing, the Ninth Circuit (Judge Wallace dissenting) affirmed its original finding that there was no operational distinction between a cause of action based upon Title VII and Sec. 1981 and that the adverse impact standards evolving from Title VII cases were sufficient to establish liability under Sec. 1981. It was held that a showing of deliberate intent to discriminate was not a requirement under Sec. 1981 as it was under the United States Constitution,

as determined by this Court in *Washington v. Davis*. The Ninth Circuit, however, did rule that respondents lacked standing to represent prior unsuccessful applicants including those taking the 1969 test because the class did not include any prior unsuccessful applicants. *Van Davis, et al. v. County of Los Angeles, et al.*, 566 F.2d 1334 at 1338.

Judge Wallace dissented, being of the opinion that constitutional standards were applicable to proving discrimination under Sec. 1981 and noting that, even if it were otherwise, the quota hiring order was improper in view of the court's finding that respondents lacked standing to represent former applicants.

The written civil service test challenged in this litigation was administered to applicants for entry-level firefigher positions twice, once in 1969 and again in January 1972. The oral interview and physical agility portions of the examination process were not attacked because they had no disproprotionate impact on minorities. The 1972 administered test was utilized only on a pass-fail basis with 97% of all applicants passing. As to these passing applicants, their subsequent oral interviews and physical examinations had no adverse impact.

The County of Los Angeles hired no firemen from well before March 24, 1972 (the effective date of Title VII) until the Spring of 1973, when the first recruit class was composed 50% of minorities (10 blacks and 20 Mexican-Americans).[2/]

2/ The respondents, in their first and second amended complaints, conceded that the hiring of this recruit class was done in a non-discriminatory manner (Clerks Transcript p. 62, lines 20-22).

All subsequent hiring has been pursuant to the trial court's 40% preferential minority hiring order of July, 1973. At no time was there any discriminatory hiring since March 24, 1972, or as a consequence of the 1972 written test.

The 1969 written exam as utilized in the hiring of new firefighters had an adverse impact on blacks and Mexican-Americans. The County, however, in the administration of the subsequent 1972 exam, initially intended (as ultimately occurred) to set the cutoff score extremely low so that 97% of the applicants passed, and then process through the oral interview and physical agility phases of the selection process approximately 500 of those applicants. These 500 would be chosen totally by random selection so that the minority applicant percentage which approximated their community representation would be maintained throughout the subsequent stages of the selection process which had shown no adverse impact.

A state lawsuit enjoined the proposed random selection and after a year's delay, the County, because of the pressing need for new firemen, initially contemplated interviewing the top 544 applicants on the 1972 written test. No such selection or interviews were ever commenced. Instead, all passing applicants were interviewed and hires were made in a non-discriminatory manner.

During the five-year pendency of the appeal, the petitioners observed and in most cases exceeded the quota hiring order and as of July, 1977 had hired as firemen recruits

267 persons, of which 158 (59.1%) were blacks or Mexican-Ameircans. Pursuant to the terms of the judgment the district court receives annual reports and retains jurisdiction over the case until the entire department reaches community racial parity.

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are:

1. An important question of federal law of great public importance should be settled by this court in order to harmonize the standards for discrimination under 42 U.S.C. Secs. 1981, 1983, and the United States Constitution. More specifically, are Title VII standards of presumptive discrimination (without a requirement of purposeful intent) applicable to actions under Sec. 1981 but not applicable to claims of discrmination under Sec. 1983 or the 14th Amendment to the United States Constitution?

2. The decision of the Ninth Circuit appears to be in conflict with an applicable decision of this court, to wit: *Washington v. Davis*, 426 U.S. 229 (1976).

3. The decision of the Ninth Circuit, ruling that purposeful discriminatory intent is not required for a cause of action under Sec. 1981, is in conflict with decisions of at least two other Courts of Appeal.

I

CONSTITUTIONAL, NOT TITLE VII, STANDARDS OF DISCRIMINATION SHOULD GOVERN CLAIMS UNDER 42 U.S.C. SEC. 1981; PURPOSEFUL DISCRIMINATION IS THE CORRECT CRITERION FOR ADJUDGING A VIOLATION OF SEC. 1981.

A federal issue of extreme importance is created by the Ninth Circuit's holding that "[w]e cannot conclude that *Washington* embraced a ruling that a showing of disproportionate impact no longer will suffice to establish a prima facie case of employment discrimination under Sec. 1981. In our view, there remains no operational distinction in this context between liability based upon Title VII and Sec. 1981," *Van Davis v. County of Los Angeles*, 566 F.2d 1334 at 1340. The liability of the petitioner under Sec. 1981 was predicated solely upon a showing of adverse impact on minorities, the trial court affirmatively finding that no deliberate intent to discriminate was present. The application to Sec. 1981 of a presumption of discrimination based on adverse impact, originating from interpretations of Title VII, is incorrect, at variance with this Court's decision in *Washington v. Davis*, and has ramifications extending far beyond employment discrimination cases. Such a holding would:

1. Encompass non-employment discrimination actions brought under Sec. 1981 which, as this Court observed in *Washington v. Davis,* would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may have a disproportionate impact. This Court in *Washington v. Davis*, 426 U.S. 229 at 244-245, footnote 12, specifically rejected the application of Title VII presumption standards to those areas of government action;

2. Permit the procedural and statutory prerequisites and administrative enforcement procedures of Title VII to be circumvented by the mere allegation of a cause of action under Sec. 1981, thus opening the federal courts to a flood of litigation that Congress intended should be channeled through and reduced by the EEOC administrative machinery;

3. Create differing standards for proving discrimination between Secs. 1983 and 1981, although both statutes are premised on the protection of constitutional rights;

4. Negate the recent decisions of this Court and circuit courts of appeal in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977); *Jones v. City of San Antonio,* 568 F.2d 1224 (5 Cir. 1978), which held that the extension of Title VII to governmental entities in March, 1972 was not retroactive and the decision in *United Air Lines v. Evans,* 431 U.S. 553 (1977), that a discriminatory act that has not been made the basis of a timely charge cannot constitute a present

violation of Title VII under the theory of a continuing effect of past discrimination.

The filing of a Title VII charge and resort to Title VII administrative machinery are not prerequisites for the institution of a Sec. 1981 action. *Johnson v. Ry Express Agency, Inc.*, 421 U.S. 454 (1975). Thus, Title VII administrative requirements could be easily circumvented merely by casting the complaint in the form of a Sec. 1981 action. Moreover, if Title VII standards of proof and liability are equally applicable to Sec. 1981 actions, there was little reason for Congress to extend Title VII to public entities in 1972.

The decision of the Ninth Circuit in the instant case, that the adverse impact standards enunciated in the Title VII case of *Griggs v. Duke Power* are perforce applicable to Sec. 1981 actions, is inconsistent with this Court's decision, in *Washington v. Davis, supra,* holding that they are not applicable to constitutional claims. Both Secs. 1981 and 1983 are statutes enacted to enforce constitutional rights and are not specifically employment discrimination statutes supported by the same congressional intent this Court ruled was present in the 1964 enactment of Title VII.

Section 1981 is a post-Civil War Reconstruction Era statute enacted in 1866 to enforce the 13th Amendment to the United States Constitution which prohibits involuntary servitude, and extends to others the same right to make and enforce contracts enjoyed by white citizens -- that is, equal protection

of the laws. Section 1981 was subsequently reenacted as part of the Civil Rights Act of 1871, which was designed to implement the 14th Amendment.

Section 1981 prohibits racial distinctions in the terms of or in the right to make a contract. It does not incorporate the subtleties and rigorous standards relating to adverse impact and test validation that have evolved with the passage of Title VII and its subsequent interpretation by the courts and administrative agencies. Indeed, none of these concepts could have possibly been in the minds of the enactors of that statute in 1866.

The rationale enunciated by this Court in *Washington v. Davis*, with regard to constitutional protections against discrimination applies equally to Sec. 1981. Thus, if the employer deliberately discriminates in making an employment contract based on race, or specifies different terms and conditions thereof based solely on race, then those statutes as well as the United States Constitution have been violated. But this is clearly not what occurred in the instant case or in *Washington v. Davis*. In both instances, the same test was administered to all races and the same grading and scoring standards for determination of eligibility for appointment were applied equally and consistently to all races. The respondents have predicated their entire case solely upon showing an adverse impact and a claim that the defendants cannot prove the test to be job-related -- evidentiary principles that have evolved *solely* from Title VII decisions.

In addition to disagreeing with the application of the *Griggs* standard in previous employment discrimination cases under Secs. 1981-1983, this Court in *Washington v. Davis* expressly ruled it inapplicable to constitutional discrimination claims in other contexts. Racial discrimination cases not involving employment have been and will continue to be brought under Sec. 1981 as well as Sec. 1983 and the Constitution. There is nothing in the legislative history of Sec. 1981 which suggests that liability is to be premised merely upon a showing of disproportionate impact or that employment cases are to be accorded special treatment or be subject to different standards of proof than other civil rights cases brought under that statute.

Title VII, however, is a statute with a unique legislative history intended to deal specifically with employment discrimination, and its adverse impact standard has evolved through subsequent judicial interpretations premised on the seminal case of *Griggs v. Duke Power Co.* It is rightly accorded different standards and methods of proof as distinguished from Secs. 1981, 1983, and the Constitution. Proof of intentional discrimination, however, should be the consistent standard applicable to claims under Sec. 1981 as well as Sec. 1983 and the United States Constitution.

II

THE DECISION IS CONTRARY TO THE SUPREME COURT'S RULING ON THE INTENT STANDARD FOR CONSTITUTIONAL DISCRIMINATION IN *WASHINGTON V. DAVIS* AND ITS DECISION ON STANDING IN *EAST TEXAS MOTOR FREIGHT V. RODRIGUEZ*

In *Washington v. Davis, supra,* This Court ruled that the standard for adjudicating claims of racial discrimination under Title VII was not the same standard for adjudicating such claims under the Constitution. Although the complaint in *Washington* alleged a cause of action under Sec. 1981 as well as the Constitution, the Court did not specifically refer to Sec. 1981 in its opinion. The rationale behind the Court's decision, however, would appear equally applicable to actions under Sec. 1981 because that statute, like Sec. 1983, was intended to provide statutory protection to constitutional rights and, while originating in the Civil Rights Act of 1866, was reenacted with Sec. 1983 as part of the Civil Rights Act of 1871. This Court in footnote 12 of *Washington* disagreed with a long line of earlier employment discrimination cases brought under both Secs. 1983 and 1981 applying Title VII standards of proof.

A few days after deciding *Washington v. Davis,* this Court vacated the judgment and remanded the case of *Chicano Police Officers Association v. Stover,* 426 U.S. 944 (1976), an action brought under Sec. 1981 and Sec. 1983 but

not Title VII, for reconsideration in light of the opinion in *Washington v. Davis.* In *Chicano Police Officers Association,* the Tenth Circuit Court, similarly to the Ninth Circuit in the instant case, had concluded that the measure of a claim under the Civil Rights Acts of 1866 and 1871 was the same as that applicable to Title VII cases. In view of the district and circuit court express findings of adverse impact and lack of job relatedness, remand would not have been necessary if Title VII standards were, in fact, applicable to Sec. 1981 claims, regardless of the effect of *Washington v. Davis* on the Sec. 1983 claim. It should be apparent that because Sec. 1981 has been held to apply to a wide range of equal protection cases, congruent with those actionable under Sec. 1983 and the Constitution, this Court's holding in *Washington v. Davis,* distinguishing claims under Title VII from those under the Constitution, is subject to circumvention in most equal protection cases by the simple expedient of alleging a claim under Sec. 1981. Since Sec. 1981 is applicable in every case in which constitutional claims of employment discrimination based on race are asserted, the Supreme Court's decision on employment discrimination in *Washington v. Davis* would be rendered essentially meaningless.

III

THE OPINION OF THE NINTH CIRCUIT IS IN CONFLICT WITH OTHER CIRCUIT COURT OPINIONS

The Courts of Appeals of the Tenth, Sixth, Seventh, and Eighth Circuits have all held that purposeful intent is

required to prove a cause of action under Sec. 1981. Numerous District Courts have reached he same conclusion.[3] With the exception of the Ninth Circuit in the instant case, no Circuit Court subsequent to *Washington v. Davis* has ruled that Title VII standards not requiring proof of discriminatory intent are applicable to actions under Sec. 1981.

The Tenth Circuit, upon remand in *Chicano Police Officers Assn. v. Stover*, 552 F.2d 918 (March 2, 1977), construed this Court's purposeful intent ruling in *Washington v. Davis* as pertaining to claims under Sec. 1981, and remanded the case to the district court for a determination of whether such intent existed.[4] The Sixth Circuit in *Arnold v. Ballard*, 12 EPD par. 11, 224 (1976), a suit brought under Sec. 1981, Sec. 1983, and the U.S. Constitution, vacated their previous decision and

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[3] *Lewis v. Bethlehem Steel Corp.*,440 F.Supp. 949, 963 (1977).

United States v. State of So. Carolina, __ F.Supp.____, 15 FEP Cases 1196 (1977), (3-judge panel that included two circuit judges).

Crocker v. Boeing Co., 437 F.Supp. 1138 (1977).

Veizaga v. National Board of Respiratory Therapy, 13 EPD par. 11, 525, 6878, 6881 (N.D. Ill., January 27, 1977).

[4] The circuit court's opinion stated:

> "[T]he error in our holding and the views expressed by us is clear. We stated that we agreed . . . with the view that the measure of a claim under the Civil Rights Act is in essence that applied to a suit under Title VII of the Civil Rights Act of 1964. 526 F.2d at 438, 11 FEP Cases at 1061. This was contrary to the principle holding that came in *Washington v. Davis, supra*, at 238, 12 FEP Cases at 1418. All of our reasoning and treatment of the case which proceeded from the erroneous standard must be corrected." *Supra*, at 920.

remanded the case to the district court for reconsideration in light of *Washington v. Davis.* Upon remand the District Court recently concluded that purposeful discriminatory intent was required under Sec. 1981 and expressly declined to follow the Ninth Circuit's opinion in the case at bar, relying instead upon the reasoning of Judge Wallace's dissent (Memorandum Decision and Order, C73-478, Mar. 14, 1978).

The Seventh Circuit in two recent cases appears to have concluded that a showing of racially discriminatory purpose is required to establish a violation of Sec. 1981. In *United States v. City of Chicago,* 549 F.2d 415 (1977), the court affirmed liability only under Title VII and reversed the district court's judgment on all other grounds, including Sec. 1981, because of the failure to meet the intentional discrimination standard. In *City of Milwaukee v. Saxbe,* 546 F.2d 693, 705 (1976), the same court held that the burden in Sec. 1981 cases is the same as the constitutional burden under the Fifth Amendment.

The Eighth Circuit most recently in *Johnson v. Alexander,* ___F.2d ___, 16 FEP Cases 894 (8th Cir., February 17, 1978), affirmed a district court judgment which, in reliance on *Washington v. Davis,* found *inter alia* that the protection against racial discrimination under Secs. 1981, 1983 does not extend beyond the equal protection guarantees of the Fifth and Fourteenth Amendments to the Constitution, and that since the challenged Army regulation[5/] was not adopted

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5/ Army Reg. 40-501, par. 2-34(a), disqualifies prospective enlistees who have had "frequent encounters with law enforcement agencies or antisocial attitudes or behavior." The Plaintiff, a black, contended that disclosure of arrest records had an adverse impact on minorities.

with any discriminatory intent, it did not violate Sec. 1981 simply because in operation it bore harder on minority groups than whites. The Eighth Circuit specifically rejected appellant's contention that Title VII standards should be applied to plaintiff's Sec. 1981 claim.

The Fifth Circuit in *Harkless v. Sweeny Independent School District*, ____ F.2d ____, 14 EPD, par. 7669, 5295 (1977), held that Sec. 1981 requires a showing of purposeful discrimination. In accord was their decision in *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508, 518 (1976).

IV

THE AFFIRMED QUOTA HIRING ORDER CLEARLY EXCEEDS THE COURT'S REMEDIAL AUTHORITY.

The instant case was brought on behalf of the 1972 and future applicants, not one of which proved he had been discriminatorily denied a job. The Circuit Court held that respondents had no standing to represent any applicants prior to the 1972 exam, and as to the hiring resulting from the 1972 examination process, the respondents conceded that it had been done in a nondiscriminatory manner. With no post-Title VII discriminatory hiring proven, it is clear that despite their lack of standing the respondents were challenging pre-Title VII hiring practices. The quota order they sought and obtained was solely intended to provide a remedy only for pre-Act hiring. It was affirmed by the appellate court totally absent

a showing of discriminatory intent, and necessarily on the theory that it remedied a violation of Sec. 1981 as no post-Title VII discriminatory hiring had occurred. Assuming, *arguendo*, that discriminatory intent is not required for a cause of action under Sec. 1981, the quota order nevertheless is in excess of the court's jurisdiction because of the respondents' lack of standing as well as the sweeping scope of the order requiring the entire department achieve racial parity.

The petitioners' uneffectuated proposal to interview the top 544 applicants on the 1972 written test cannot form the basis of a violation of Title VII, much less justification for an order requiring racial parity in the entire work force. A violation of Title VII requires proof of a pattern and practice of discrimination. Isolated incidents, even if effectuated, are insufficient to establish liability under that statute. *Hazelwood School District v. United States*, ____ U.S. ____, 97 Sup.Ct. 2736, 15 FEPCases 1 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 14 FEP Cases 1514 at 1519 (1977).

Quota hiring orders unrelated to the injury established are not within the remedial power of the court. The respondents in this action, suing only on behalf of present and future applicants, did not establish that any of their number had been discriminatorily refused a job. The proposal to interview the top 544 candiates had no impact on the departmental composition as no hires were made as a result of such proposal and the

interviews were not restricted to the top 544 persons.

The decision of the Circuit Court affirming the quota hiring order disregards the applicable statute of limitations on Sec. 1981 claims,[6/] ignores this court's ruling in the *United Airlines v. Evans,* 431 U.S. 553 (1977), that past discriminatory acts not the subject of a timely complaint have no present legal consequences, and, to the extent Title VII is even applicable, purports to retroactively remedy acts occurring before its March 24, 1972, effective date.[7/] It is clear that the majority misconstrued the decision in *United Airlines v. Evans* in their holding at page 1344, footnote 20, that time-barred claims may be remedied retroactively.

Within the past two years, this Court has in several opinions expressly declined to extend Title VII remedies retroactive to the Act's effective date, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324; *Franks v. Bowman,* 424 U.S. 747 (1976). In *Teamsters,* and particularly in *Hazelwood School District v. United States, supra,* this Court clearly distinguished between pre and post-Title VII hiring practices, observing that the employer must be given an opportunity to

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6/ The applicable Statute of Limitations is three years. See *Mills v. Small,* 446 Fed.2d 249 (1971).

7/ Indeed, unless one assumes that *all* of the 1760 *firefighters on the* force had been hired in the eight years immediately preceding the lawsuit, the quota order seeks to remedy unproven discrimination occurring even before the original enactment of the Title VII in 1964.

show the claimed discriminatory pattern was a product of pre-Act hiring rather than unlawful post-Act discrimination. This necessarily implies not only a time limitation on Title VII standards of proof, but also limitations on the reach of judicially imposed remedies.

The Ninth Circuit's decision establishes an unjustified dichotomy between injunctive (preferential hiring) relief and other accepted remedies, such as back pay and retroactive seniority which have been consistently held to be limited in scope by the applicable statute of limitations or the effective date of Title VII and similar employment discrimination statutes. *Franks v. Bowman, supra; International Brotherhood of Teamsters v. United States, supra.* Back pay awards in Sec. 1981 employment discrimination suits have been held to be limited to the applicable 3-year Statute of Limitations period preceding the filing of the action. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5 Cir. 1974).

The quota ruling has consequences extending far beyond the impact on the parties herein. It, of course, effectively makes Title VII retroactive, reduces the administrative filing requirements of Title VII to meaningless technicalities, and provides a remedy for time-barred claims. Moreover, it permits federal trial courts, on the most tenuous of grounds, to issue quota orders requiring parity of the employer's work force with the current community ethnic representation.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the Petition for Writ of Certiorari herein.

Executed this 26th day of April, 1978, at Los Angeles, California.

Respectfully submitted,

JOHN H. LARSON
County Counsel

WILLIAM F. STEWART
Chief, Labor Relations Division

Attorneys for Appellants

APPENDIX A

Van DAVIS et al., Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES et al., etc., Defendants-Appellees.

Van DAVIS et al., Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES et al., etc., Defendants-Appellants.

Nos. 73-3008 and 73-3009.

United States Court of Appeals, Ninth Circuit.

Dec. 14, 1977.

Rehearing Denied Jan. 30, 1978.

Affirmed in part, reversed in part and remanded.

Wallace, Circuit Judge, dissented with an opinion.

Before TUTTLE,* HUFSTEDLER and WALLACE, Circuit Judges.

TUTTLE, Circuit Judge:

This Court entered its original opinion in this case on October 20, 1976. The Court thereafter granted defendants-cross-appellants' motion for rehearing, and the case was regularly set down for rehearing and oral argument. Although the principal basis for the rehearing motion was the Supreme Court's decision in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the parties were permitted to brief and argue all other issues as well.

We now withdraw the original opinion and decision, and this opinion and decision are announced in their stead.

This suit was brought on behalf of all present and future black and Mexican-American applicants for positions as firemen with the Los Angeles County Fire Department,[1] alleging that the defendants Los Angeles County, the County Board of Supervisors and the County Civil Service Commission had been guilty of racial discrimination in hiring in violation of the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*[2]

The district court found that the Los Angeles County Fire Department employed blacks and Mexican-Americans grossly out of proportion to their number in the population of Los Angeles County. The court further found that the Fire Department, despite its admitted knowledge of its prior discriminatory practices and its bad reputation as an employer in the minority community, failed to undertake any effective positive steps to eradicate the effects of prior discrimination. Accordingly, the court ordered accelerated hiring of racial minorities in a ratio of one black and one Mexican-American applicant for each three white applicants until the effects of past discrimination had been erased.[3]

* Honorable Elbert P. Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.

1. The plaintiff class also included all present and future black and Mexican-American employees of the Fire Department, who alleged racial discrimination in connection with defendants' promotion practices. These additional allegations, however, were abandoned prior to trial.

2. Jurisdiction was based on 28 U.S.C. § 1343.

3. Data introduced by the plaintiffs showed that this 1-1-3 ratio, given the present rate of hiring, would produce a work force of minority firemen in proportion to the number of minority persons in the community by 1979 for blacks and 1983 for Mexican-Americans.

Despite the fact that the Mexican-American population of Los Angeles County was approximately double the size of the black population, the district court ordered identical accelerated hiring for both groups due to its finding that the Fire Department's 5'7" height requirement for job applicants was a valid requirement for employment and that this height requirement had the effect of eliminating 41% of the otherwise eligible Mexican-American applicants from consideration.

The plaintiffs appeal the trial court's finding that the 5'7" height requirement is valid and could therefore be used in limiting the relief available to the Mexican-American members of the plaintiff class. The defendants cross-appeal the trial court's order of accelerated hiring. We affirm the district court's finding of a current violation of the rights of members of this class by the improper post-1971 use of an unvalidated written test as a selection device for entry level positions and its order of accelerated hiring to cure past racial discrimination; we disagree with the court's findings that plaintiffs have standing to challenge defendants' pre-1971 use of an unvalidated written test as a selection device and that the 5'7" height requirement has been sufficiently validated by the defendants. Accordingly, we reverse and remand for reconsideration of the proper ratio of accelerated racial hiring to be ordered.

I. *Written Examination Procedures*

[1] Despite a minority population of approximately 29.1% in Los Angeles County, only 3.3% of the firemen employed by the defendants at the time of trial were black or Mexican-American. Plaintiffs alleged, and the trial court found, that this severe racial imbalance resulted in part from the defendants' utilization of unvalidated written examinations to rank applicants for positions as firemen. The defendants do not, and indeed cannot, dispute that these verbal aptitude tests, administered to applicants in August 1969 and in January 1972, had a discriminatory impact on minority applicants. Of the 244 blacks who took the 1969 examination, 5 were hired; of the 100 Mexican-Americans, 7 were hired, while of the 1080 whites taking the test, 175 were hired. Thus, while approximately 25% of the 1969 applicants were black or Mexican-American, based on the results of this test only 6.4% of the hires were minorities. Black and Mexican-American applicants fared no better on the 1972 examination. Specifically, while 25.8% of the white applicants were among the top 544 scorers on the test, only 5.1% of the black applicants were included in that group. Applying the now-familiar standards announced in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the district court concluded that such statistical data alone established a prima facie case of racial discrimination in employment, thereby shifting the burden to the defendants to establish that the tests were job-related.[4] We agree that defendants failed to satisfy their burden.[5]

Defendants have challenged the plaintiffs' standing to complain of the use of the unvalidated 1969 written test. In light of the fact that plaintiffs' class did not include any prior unsuccessful applicants, it follows that plaintiffs neither suffered nor were threatened with any injury in fact from the use of the 1969 examination. No firemen were hired on the basis of success on this

4. The cases holding that statistics alone may prove a prima facie case of employment discrimination, thereby shifting the burden to the defendants to justify the racial imbalance, are by this time legion. *See, e. g., United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871, 875 (6th Cir. 1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 225 (5th Cir. 1974); *United States v. N. L. Indus., Inc.*, 479 F.2d 354, 368 (8th Cir. 1973); *United States v. Hayes Int'l Corp.*, 456 F.2d 112, 120 (5th Cir. 1972); *United States v. Ironworkers Local 86*, 443 F.2d 544, 550–51 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

5. Defendants conceded that no studies establishing the validity of the written employment tests have been conducted in accordance with "professionally acceptable methods." *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

test after plaintiffs became applicants in October 1971. The parties stipulated that approximately 100 vacancies occur in the ranks of firemen each year, and testimony at trial established that 187 applicants were placed on an eligibility list following the 1969 test. Based on these facts, we must conclude that the 1969 list was depleted before plaintiffs applied for employment as firemen.

[2] In the absence of a statute expressly conferring standing, it is well settled that in order to have standing a plaintiff must suffer some actual or threatened injury as a result of the alleged unlawful conduct. *See, e. g., Linda S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166–67, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *Baker v. Carr*, 369 U.S. 186, 204–208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). It is thus clear that plaintiffs lacked standing to challenge defendants' prior use of the test in 1969.[6]

6. Our holding on this point makes it unnecessary to discuss defendants' contention that the recent decision in *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), precludes plaintiffs from attacking the defendants' pre-1971 hiring procedures.

It is equally clear that defendants' decision to employ the 1972 written test as a selection device was an unlawful employment practice which had adverse impact on the racial class of plaintiffs. The plaintiffs thus have standing to litigate the lawfulness of the 1972 test.

7. Only four other Courts of Appeals have had occasion to apply or construe the decision in *Washington*. The Court of Appeals for the D.C. Circuit has stated that a plaintiff proceeding under Title VII and § 1981 need not show the type of purposeful or intentional discrimination required to establish a violation of the Equal Protection Clause *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830 (D.C. Cir. 1977) (dictum).

In *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), the court reversed the trial court's finding that the defendants' written examination violated the Fourteenth Amendment solely because the plaintiffs failed to satisfy the purposeful discrimination requirement of *Washington*. *Id.* at 435. The *City of Chicago* plaintiffs also had alleged that the examination violated § 1981, and defendants here contend that the appeals court equated § 1981 with the Fourteenth Amendment for purposes of determining the burden of proof applicable to non-Title VII actions. The *City of Chicago* court, however, made no mention of § 1981 in reversing the district court's ruling but specifically held that the defendants' hiring and promotion policies "did not violate *the Constitution.*" *Id.* (emphasis added).

In *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431 (10th Cir. 1975), an employment discrimination action alleging violations of the Equal Protection Clause, §§ 1981, 1983 and 1985, the court held that "the measure of a claim under the Civil Rights Act is in essence that applied in a suit under Title VII . . . ." *Id.* at 438. (citations omitted). Subsequently, the Supreme Court granted certiorari, vacated the judgment and remanded for reconsideration in light of *Washington v. Davis*. *Stover v. Chicano Police Officer's Ass'n*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976). Defendants here argue that had the Supreme Court intended the adverse impact rule of Title VII to apply to § 1981 actions after *Washington*, the Court simply would have denied certiorari in *Stover* and allowed the judgment to stand on the basis of a violation of § 1981 alone. However, neither the district court nor the court of appeals in *Stover* ever found that defendants had violated § 1981. Further, it is clear that the Supreme Court's action was necessitated by the court of appeal's failure to distinguish causes of action under §§ 1981 and 1983 in

As previously indicated, the district court reached the conclusion that defendants' use of unvalidated written examinations was an illegal employment practice through application of the principles announced in *Griggs*, a Title VII case. Subsequent to trial on the merits in this case, the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), held that to establish a prima facie case of *unconstitutional* employment discrimination, discriminatory intent or purpose must be shown rather than or in addition to a statistical showing of disproportionate impact. Defendants interpret *Washington* to require similar proof in cases alleging employment discrimination under § 1981. Accordingly, defendants urge us to reverse the decision of the district court, since no showing was made that defendants administered the 1972 examination with any intent or purpose to discriminate against minority applicants. The issue presented is one of first impression in this Circuit.[7] We have

carefully reviewed the Court's opinion in *Washington* and the post-*Washington* cases brought to our attention by the parties. We must reject defendants' argument.

The primary controversy in *Washington* involved the validity of a qualifying test—"Test 21"—administered to persons seeking employment with the D.C. Metropolitan Police Department. The plaintiffs alleged that Test 21 excluded a disproportionately high number of black applicants in violation of their rights under the Due Process Clause of the Fifth Amendment, 42 U.S.C. § 1981 and § 1-320 of the D.C. Code. 426 U.S. at 233, 96 S.Ct. 2040. Following various preliminary proceedings before the trial court, plaintiffs moved for partial summary judgment on their constitutional claim alone. Defendants also moved for summary judgment, asserting that plaintiffs were entitled to relief on neither constitutional nor statutory grounds. The district court, after finding that plaintiffs' statistical showing of disproportionate impact established a prima facie case of discrimination, concluded that Test 21 was "reasonably and directly related to the requirements of the police recruit training program." *Davis v. Washington*, 348 F.Supp. 15, 17 (D.D.C. 1972). Accordingly, the court granted defendants' and denied plaintiffs' motions. *Id.* at 18.

On appeal, plaintiffs argued that their summary judgment motion, which rested on purely constitutional grounds, should have been granted. The Court of Appeals for the D.C. Circuit agreed and reversed. *Davis v. Washington*, 168 U.S.App.D.C. 42, 512 F.2d 956 (1975). Announcing that it would be guided in its decision by the Title VII standards formulated in *Griggs*, the appeals court agreed that plaintiffs' statistical showing alone, without proof of a purpose on the employer's part to discriminate, made out a prima facie case, shifting the burden of proof to the defendants. 168 U.S.App.D.C. at 47, 512 F.2d at 961. In light of the district court's finding of a nexus between Test 21 and future success *in police training school*, the court then identified the "ultimate issue" to be "whether that kind of proof [was] an acceptable substitute" for the *job-relatedness* showing required by *Griggs*. *Id.*, 168 U.S. App.D.C. at 48–49, 512 F.2d at 962–63. Concluding that it was not, the court directed that plaintiffs' motion for partial summary judgment be granted and the defendants' motions denied.

The Supreme Court reversed, concluding that plaintiffs "were entitled to relief on neither constitutional nor statutory grounds." *Washington v. Davis*, 426 U.S. 229, 248, 96 S.Ct. 2040, 2052, 48 L.Ed.2d 597 (1976). Mr. Justice White prefaced Part II of the majority opinion with this statement: "Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving *the constitutional issue* before it, we reverse . . . ." *Id.* at 238, 96 S.Ct. at 2046 (emphasis added). In holding that proof of racially discriminatory intent or purpose is required to show an equal protection violation, the Court disavowed ever having ruled that "a law or other official act . . . is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 239, 96 S.Ct. at 2047. It is significant that throughout this discussion of "constitutional standards" and "Constitution-based claims,"[8] the Court mentioned neither

equating the "Civil Rights Act" and Title VII. And although the case was eventually remanded to the district court, *Chicano Police Officer's Ass'n v. Stover*, 552 F.2d 918 (10th Cir. 1977), the issue before this Court was not expressly decided.

Finally, in *Arnold v. Ballard*, 12 E.P.D. ¶ 11,224 (6th Cir. 1976) (per curiam), the court vacated an earlier decision and remanded for reconsideration in light of *Washington*. The per curiam opinion, however, did not discuss the issue now before us and did not explain the rationale underlying the court's decision.

8. The language used by the Court clearly indicates that Part II of the opinion was directed solely toward claims of unconstitutional employment discrimination. The following passages are illustrative: (1) "We have never held that the *constitutional* standard for adjudicating claims of invidious racial discrimination is identical" to the Title VII standards. 426 U.S. at 239, 96 S.Ct. at 2047 (emphasis added); (2) "This is not to say . . . that a law's dis-

§ 1981 nor cases construing that statute.[9] Nor can it be said that in resolving the equal protection question before it, the Court necessarily resolved the § 1981 claim on the same basis.

[3] During recent history, every court which has considered the question has construed § 1981 to bar discrimination in employment. *See Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Macklin v. Spector Freight Sys., Inc.*, 156 U.S.App.D.C. 69, 478 F.2d 979 (1973); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970). The courts consistently have employed Title VII principles as a benchmark not only in cases involving alleged discriminatory impact, *see Wade v. Mississippi Coop. Extension Serv.*, 528 F.2d 508, 516–17 (5th Cir. 1976); *King v. Yellow Freight Sys., Inc.*, 523 F.2d 879, 882 (8th Cir. 1975); *Kirkland v. New York State Dept. of Correctional Servs.*, 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied*, 429 U.S. 823, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976); *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975), but in other contexts as well. *See, e. g., Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1281 & n. 3 (7th Cir. 1977) (discriminatory discharge of employee); *McCormick v. Attala County Bd. of Educ.*, 541 F.2d 1094, 1095 (5th Cir. 1976) (per curiam) (available remedies). Indeed, the Supreme Court has recognized that Title VII and § 1981 embrace "parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n. 7, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1973). In the absence of any express pronouncement from the Supreme Court—a pronouncement not delivered in *Washington*—we are unwilling to deviate from this established practice. Any unnecessary deviation not only could produce undesirable substantive law conflicts, *see Waters v. Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976), but also would dilute what has been a potent remedy for the ills of countless minority employees subjected to the unlawful discriminatory conduct of their employers. Thus, we cannot conclude that *Washington* embraced a ruling that a showing of disproportionate impact no longer will suffice to establish a prima facie case of employment discrimination under § 1981.[10] In our view, there remains no operational distinction in this context between liability based upon Title VII and § 1981.

[4, 5] The defendants further argue that the district court lacked jurisdiction under either §§ 1981 or 1983 to decide these

proportionate impact is irrelevant in cases involving *Constitution-based* claims of racial discrimination." *Id.* at 241, 96 S.Ct. at 2048 (emphasis added); (3) "Disproportionate impact . . . is not the sole touchstone of an invidious racial discrimination forbidden *by the Constitution*." *Id.* at 242, 96 S.Ct. at 2049 (emphasis added); (4) "We are not disposed to adopt [the] more rigorous [Title VII] standard for the purposes of applying *the Fifth and the Fourteenth Amendments* . . ." *Id.* at 247-48, 96 S.Ct. at 2051 (emphasis added).

9. Defendants contend that the *Washington* majority "specifically refer[red] to several § 1981 cases and note[d] their disagreement with the appellate court's reliance upon the Title VII standards of proof." The Court did note its disapproval of several cases but explained that it was in disagreement only "to the extent that those cases rested on or expressed the views that proof of discriminatory racial purpose is unnecessary in making out *an equal protection violation*." 426 U.S. at 245, 96 S.Ct. at 2050 (emphasis added). Furthermore, each case cited in this context involved, in addition to a § 1981 claim, a claim under either the Equal Protection Clause or § 1983.

10. *Accord, League of Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal. 1976). *But see Ortiz v. Koch*, 14 F.E.P. Cases 1019 (D.Colo.1977); *Johnson v. Heffman*, 424 F.Supp. 490 (E.D.Mo.1977); *Resident Advisory Bd. v. Rizzo*, 425 F.Supp. 987 (E.D.Pa.1976).

claims. As to § 1983, the defendants are clearly correct. A municipality is not a "person" suable under § 1983,[11] and thus the three municipal defendants are not subject to suit under § 1983. *See City of Kenosha v. Bruno*, 412 U.S. 507, 511–13, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Monroe v. Pape*, 365 U.S. 167, 187–92, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Since no individual defendants were named in this suit, the plaintiffs' § 1983 claim is barred.[12] Section 1981, however, is not subject to the same jurisdictional limitations. *See Sethy v. Alameda County Water Dist.*, 545 F.2d 1157 (9th Cir. 1976) (en banc).

[6, 7] In summary, we believe the district court properly found defendants' use of the 1972 written examination as a selection device to be a violation of § 1981. Plaintiffs produced overwhelming statistical data to establish the test's disproportionate impact upon minority applicants, and the defendants were unable to validate the test in terms of job-relatedness.[13] Defendants' decision, prompted solely by the filing of this lawsuit, to abandon the written exam as a selection device does not moot the claim. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632–33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)[14].

11. 42 U.S.C. § 1983 provides:

"Every *person* who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." (emphasis added)

12. Individuals may be sued in their official capacity. *See Sterzing v. Fort Bend Independent School Dist.*, 496 F.2d 92, 93 n. 2 (5th Cir. 1972); *United Farmworkers of Florida Housing Project, Inc. v. City of Del Ray Beach*, 493 F.2d 799, 802 (5th Cir. 1974); *Harper v. Kloster*, 486 F.2d 1134, 1138 (4th Cir. 1973). As the plaintiffs did not allege federal question jurisdiction under 28 U.S.C. § 1331, their Fourteenth Amendment claim does not stand apart from their § 1983 claim. Although it should be clear, we also note that since no purposeful or intentional discrimination by the defendant was proved, plaintiffs' Fourteenth Amendment and § 1983 causes of action could not have been sustained under *Washington*.

II. *The 5 Foot, 7 Inch Height Requirement*

Among the other of defendants' practices challenged by the plaintiffs was the 5'7" height requirement. In *Dothard v. Rawlinson*, — U.S. —, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), the Supreme Court held that Title VII forbids the use of height requirements which have discriminatory effect unless the employer meets "the burden of showing that [the] requirement [has] . . . a manifest relation to the employment in question." *Id.* at 2726, *quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

[8] Here there can be no question that the 5'7" height requirement has discriminatory impact. The parties stipulated that 41% of the otherwise eligible Mexican-American applicants are excluded by the requirement.[15] The defendants further conceded that no scientifically approved test has been utilized to determine whether the height requirement is in fact job-related. The only testimony in the record on point is that of Chief Stanley E. Barlow, himself only 5'8", who testified that he believed a small man might have difficulty

13. In Part III of the opinion in *Washington v. Davis*, the majority agreed with the district court's conclusion that Test 21 had been sufficiently validated by a validation study and other evidence showing a nexus between success on the test and success in police training school. 426 U.S. at 250–51 & n. 17, 96 S.Ct. 2040. It is at least arguable that by not requiring the defendants to meet the job-relatedness standards of Title VII, the Court implicitly held that employers sued under § 1981 may escape liability by showing something less than job-relatedness. We need not address that question here, since defendants' proof not only is insufficient under *Griggs*, but also falls far short of the quality and quantity of proof offered in *Washington*.

14. Of course, this continued threat to use the 1972 test as part of the selection process right up to the filing of the complaint in this case is admittedly a violation of Title VII.

15. We accordingly note that the continuing use of this height requirement constitutes a continuing violation of Title VII and provides a basis for relief in addition to § 1981.

working with taller men in removing long ladders and other equipment and might have a slower reaction time in climbing on and off equipment. Chief Barlow conceded that in the past firemen under 5'7" have been able to function without impairment due to their height.[16]

[9] It seems clear to us that this testimony falls far short of validating a height requirement which has a serious impact in restricting Mexican-American employment in the County Fire Department.[17] The district court did not have the benefit of *Dothard, supra*, and, therefore, did not apply the standard of proof required by that case. The evidence introduced was inadequate to meet the *Dothard* requirement that the height restriction was manifestly related to employment by the Fire Department. Accordingly, the district court's finding of job-relatedness must be reversed.

III. *Affirmative Relief*

[10] The defendants contest the affirmative relief ordered by the district court. However, as this Court has noted,

> "[t]here can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the non-existence of future barriers to the full enjoyment of equal job opportunities by qualified black workers."

United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (citations omitted). We do not believe the court lacks equal power under § 1981 to order relief. Indeed, "[i]n fashioning an appropriate remedy for employment discrimination, Congress has granted courts plenary equitable power under both Title VII . . . and section 1981." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 243 (5th Cir. 1974) (footnotes omitted). Although the decided cases have primarily involved either Title VII or § 1983, and not § 1981, we feel the extensive case law under both sections approving affirmative relief is directly applicable here. We see no reason to limit the relief available under § 1981 merely because in the past § 1981 and Title VII have been read in tandem. *See, e. g., Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974) *modified*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). Similarly, we note that Title VII and § 1983 cases frequently have been cited as involving analogous principles in fashioning equitable relief, *see Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 628 (2d Cir. 1974); *Carter v. Gallagher*, 452 F.2d 315, 329 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972), and cases involving one statute have been cited in support of the relief ordered in cases involving the other.

Eight Courts of Appeals, including this one, have considered and approved the use of accelerated hiring goals or quotas to eradicate the effects of past discrimination. *See Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975) (§§ 1981 & 1983, Title VII); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) (Title VII); *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974) (Title VII); *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), *modified*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (Title VII); *Morrow v.*

16. These shorter firemen were employed during World War II when the standard was relaxed, and when firemen of other cities automatically joined the L.A. County Fire Department when their employing cities were annexed by L.A. County.

17. Our earlier comments with respect to validation of employment criterion challenged under § 1981 are equally applicable in this context. *See* note 15, *supra*.

Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1974) (§ 1983); *Vulcan Society v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973) (§ 1983); *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974) (Title VII); *Bridgeport Guardians, Inc. v. Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973) (§§ 1981, 1983); *United States v. N.L. Indus., Inc.*, 479 F.2d 354 (8th Cir. 1973) (en banc) (§ 1983); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (en banc) (§ 1983); *United States v. Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973) (Title VII); *United States v. Wood Lathers Local 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973) (Title VII); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (§ 1983); *United States v. Carpenters Local 169*, 457 F.2d 211 (7th Cir.), *cert. denied*, 409 U.S. 851, 93 S.Ct. 63, 34 L.Ed.2d 94 (1972) (Title VII); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972) (§ 1983); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (Title VII); *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971) (Title VII); *United States v. Local 38, IBEW*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970) (Title VII); *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (Title VII).[18] While the defendants argue § 703(j) of Title VII forbids the imposition of racial quota hiring, even were this to be an order premised solely on Title VII, we note this view has been uniformly rejected by the many courts which have considered the question.

[11] We believe the district court properly exercised its discretion in ordering affirmative action to be undertaken to erase the effects of past discrimination. We do not believe that such relief may be limited to the identifiable persons denied employment in the past—for "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." *Carter v. Gallagher*, 452 F.2d at 330.

> Nor are remedial goals limited to any specific or prescribed form. The precise method of remedying past misconduct is left largely to the broad discretion of the district court. Goals have been expressed in terms of specific numbers or ratios . . . or percentages . . . .

Rios v. Steamfitters Local 638, 501 F.2d at 631 (citations omitted).

While we remand because the district court expressly stated that the reason it ordered identical accelerated hiring of blacks and Mexican-Americans in equal ratios was because of the validity of the 5'7" height requirement, we do not necessarily believe a 1–1–3 ratio was incorrect. The court, however, should reconsider its order in light of our decision that the 5'7" height requirement is invalid and that plaintiffs lacked standing to challenge defendants' use of the 1969 written examination.

[12] The defendants finally argue that the imposition of an affirmative order to hire minority applicants is unnecessary. They argue in effect that they have already commenced and that they can be relied upon further to improve their hiring practices without the added impetus of a court order. The experience of the Court of Appeals for the Fifth Circuit is useful in this regard—"protestations or repentance and reform aimed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined will not be repeated." *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972); *accord, United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952). Here the

18. *Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973) did not hold to the contrary, but upheld the district court's refusal to impose quotas within the facts of that case as not being an abuse of discretion.

record shows that the defendants had decided to use an unvalidated verbal aptitude test to hire new candidates in 1973 and that the *only* reason the test was not used was notice of this suit. The personnel director of the defendants testified at length at the trial and acknowledged that he was aware of the discriminatory impact such a test would have. Further, the trial judge found that defendants had failed and refused to take necessary affirmative steps to overcome the department's bad reputation in black and Mexican-American communities. We emphasize that this was not a close case—in a community of 29.1% minority population, only 3.3% of the firemen employed by defendants were black or Mexican-American. These factors are hardly persuasive evidence of the defendants' good faith, even were such good faith relevant in fashioning relief.[19] We agree with the district court that an accelerated hiring order is the only way "to overcome the presently existing effects of past discrimination within a reasonable period of time."

In sum, we believe the district court was wholly justified in deciding to impose affirmative hiring orders upon the defendants.[20]

While it should be obvious to all, we nevertheless repeat the admonition that nothing said by this Court is to be taken as a requirement that the defendants hire any unqualified applicant for the performance of these essential jobs.

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings not inconsistent with this opinion.

WALLACE, Circuit Judge, dissenting:

I respectfully dissent.

Discrimination in employment based upon race, creed or color is a practice inconsistent with the views and aspirations of nearly all Americans and clearly repugnant to the principles upon which our society is built. But even in rooting out such an evil practice, we are bound by certain procedural and jurisdictional limitations which may serve to protect the rights of others.

I think it is clear from the record that the plaintiffs' challenges to two of the three allegedly illegal employment practices are barred by such a jurisdictional limitation. The majority concedes that the named plaintiffs have no standing to attack the defendants' pre-1971 hiring procedures. I agree. I believe it equally plain that they lack standing to challenge the height limitation.

As to the remedy, I conclude that while the plaintiffs may well have standing to challenge the post-1971 hiring procedures, there is a critical issue as to whether the imposition of minority hiring quotas is now warranted given the limited scope of this issue and the circumstances under which the defendants' objectionable conduct occurred. Because the district court imposed quotas based on conduct which in large part has been rejected by the majority as a basis for remedial action, the district judge may well now believe that mandatory quotas are no longer appropriate. Because the question should be resolved in the first instance by the trial judge, I would reverse and remand for reconsideration of the appropriate remedy in light of the limited standing of the plaintiffs and the nature of the defendants' conduct within the new, limited time frame adopted by the majority in this case.

I. *The Height Limitation*

As an initial matter, it is clear to me that the issue of the 5'7" height limitation was never properly before the district court. The issue comes to us by a curious route. The plaintiffs phrase their request for relief as follows:

19. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), a Title VII case, the Supreme Court rejected good faith as a defense. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432, 91 S.Ct. at 854. We believe good faith is equally inapplicable to § 1981.

20. We do not read *United Air Lines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) to restrict in any way the affirmative relief ordered in this case.

The only modification of the Judgment sought in this appeal is an increase of the Mexican-American hiring ratio, such increase to be ordered if there is a reversal by this Court of Appeal of the District Court's conclusion of law that the height standard is job-related and legal. Plaintiffs-appellants did not seek below and do not seek on this appeal, an order enjoining the use of the 5'7" height standard. Since the plaintiffs do not contest the legality of the height limitation, I do not see how the district judge erred in taking the height limitation into account in fashioning the remedy.

But even assuming the height limitation is properly at issue, the parties before us do *not* have standing to pursue it. None of the named plaintiffs is alleged to be shorter than 5'7". To the contrary, it has been stipulated that all of the named plaintiffs are present employees or presently on an eligibility list. Since one of the requirements is a minimum height of 5'7", each of them must be at least that tall. Consequently, none of them have suffered an injury-in-fact from the alleged discriminatory practice. In addition, since the class was certified as "all present and future . . . Mexican-American applicants," some of whom will surely be less than 5'7" tall, the named plaintiffs cannot properly represent them because their interests are potentially antagonistic. Fed.R.Civ.P. 23(a)(3), (4). Indeed, applicants 5'7" or taller have an interest in limiting the number of their competitors by retaining the height requirement. This may be the reason why the plaintiffs did not ask that the height limitation be enjoined but merely now seek a larger hiring quota for Mexican-Americans in spite of it. These facts amply demonstrate the need for and the protection built into standing requirements. Although this lack of standing is obvious, it is not even discussed by the majority.

II. *The Pre-1971 Examination Procedures*

The villain of the pre-1971 examination procedures was a discriminatory written test used as a ranking device. All hiring was done from an eligibility list which was the final product of an examination process. The process began with the written test and a physical agility test and the top scorers were then selected for oral interviews. A total score was given each applicant, with the discriminatory written test having a 35 percent weighted value. The highest ranking candidates were certified for placement on the eligibility list from which vacancies were filled. When the list was exhausted, which usually happened in about two years, a new examination process would begin in order to produce a new eligibility list.

The district court held that the plaintiffs made out a prima facie case of employment discrimination by proving that at the time the complaint was filed in 1973, only 3.3 percent of the firemen employed by the defendants were black or Mexican-American despite the fact that those minorities accounted for approximately 29.1 percent of the population of Los Angeles County.[1] These employment statistics are necessarily the result of the defendants' pre-1971 hiring practices since no firemen were hired thereafter until the complaint was filed. But the majority admits that the plaintiffs lacked standing to challenge these practices. Consequently, the pre-1971 practices were entitled to only a narrowly restricted role in the fashioning of the remedy in this case, as explained in part III. C. below.

III. *The Post-1971 Examination Procedures*

A. *The Facts*

Prior to accepting applications for a new examination procedure in 1971, the entire procedure was changed. Since the named plaintiffs' applications were processed under these new procedures, they clearly have standing to litigate their legality. Given the limited scope of the claim, however, I

1. The district court found that 10.8 percent of the population of Los Angeles County was black and 18.3 percent Mexican-American.

question the appropriateness of the sweeping injunctive relief granted.

The new procedures were to be as follows. Written tests were to be eliminated as a ranking device, but because of the large number of applicants (3500) and the relatively few job openings (33), some method had to be adopted to limit the number of applicants interviewed. Thus a new written test was designed in an attempt to eliminate cultural bias. The test was to be given and graded on a pass-fail basis for the sole purpose of screening out illiterates. Five hundred of the passing applicants were to be selected at random for oral interviews. This method eliminated the written test as a ranking device and gave every passing applicant an equal opportunity to be chosen for an oral interview. Ninety-seven percent of the applicants passed the written test; 1,885 were white, 170 black and 283 Mexican-American. The passing applicants were to be ranked solely on the basis of the results of the physical agility test and the oral interviews.

The new written test was administered in 1972, but before the random selection could be made, a lawsuit was filed in state court against the county, charging that the random selection process violated provisions of the county charter and civil service regulations requiring that selection for oral interviews be made on merit. The county was enjoined from using this method pending trial on the merits. As a result, the examination process was halted for over two years and no interviews or physical tests were given and no eligibility list was certified.

As vacancies increased, the county fire department urged that the applicants who by this time had been waiting for almost 18 months, be interviewed and an eligibility list certified. In desperation, the county Department of Personnel proposed to interview those applicants who had received the top 544 scores on the 1972 written test. Of this number, 492 were white, 10 black and 33 Mexican-American. These applicants were not to be ranked on the basis of the test results, however, and the interviews were not intended to eliminate the remaining applicants from consideration. The purpose was solely to expedite the hiring of sufficient firemen to meet the immediate, urgent requirements of the fire department.

The plaintiffs herein objected to this proposal. Upon learning of the complaint about to be filed in this action, the Director of Personnel abandoned the plan and implemented a new procedure whereby all of the passing applicants would be interviewed. The interviews commenced on January 20, 1973.

The plaintiffs filed this civil rights action naming as defendants the County of Los Angeles, the Board of Supervisors of the county and the Civil Service Commission. The complaint alleged racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983; it was later amended to invoke Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* as well. The defendants completed interviewing all of the applicants by the end of March 1973 and certified an eligibility list. Of the top 315 applicants on this list, 210 were white, 39 black, 59 Mexican-American and 7 of other races (a total of 33.5 per cent "minorities"). It was conceded by the plaintiffs that this examination and ranking procedure did not have a discriminatory impact on blacks and Mexican-Americans.

At the conclusion of the trial, the district court specifically found that the defendants had not interfered with affirmative action efforts designed to increase black and Mexican-American participation rates and that, to the contrary, several officials had engaged in efforts designed to increase minority representation in the fire department. The court further found that neither the defendants nor their officials had engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment.

The court concluded, however, that the defendants had engaged in the discriminatory employment practice of utilizing as a selection device non-validated written tests that had a disproportionate detrimental im-

pact on blacks and Mexican-Americans. This evidently included the defendants' short-lived intent to interview only the top 544 scorers on the 1972 examination. This, of course, is the *only* examination procedure of which the plaintiffs may complain since they lack standing to challenge all previous examinations.

B. *Liability for the Attempted Use of the 1972 Examination*

In deciding that the attempted use of the 1972 written examination was illegal, the majority relies almost exclusively upon 42 U.S.C. § 1981. Only in a footnote is it mentioned that this same conduct also constitutes a Title VII violation.[2] I agree with the majority that under *United States v. W. T. Grant Co.*, 345 U.S. 629, 632–33, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), the defendants' decision, prompted by the commencement of this lawsuit, not to use improperly the 1972 examination as a selection device, does not shield them from liability. But I would base that liability on Title VII, not section 1981. The majority's extensive discussion of section 1981 is not only incorrect, but in this case it is wholly unnecessary.

The district judge found as a matter of fact that "neither the defendants nor their officials had engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment." Since a prima facie case under Title VII clearly does not require proof of an improper purpose when a discriminatory impact is alleged, *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), this finding does not put defendants beyond the reach of Title VII.

The majority's decision that section 1981 similarly requires no proof of intentional discrimination is both unnecessary and unfortunate. The potential scope of section 1981 is exceptionally broad, going far beyond the Title VII realm of employment, and conceivably reaching virtually all private contractual arrangements. *See Runyon v. McCrary*, 427 U.S. 160, 168–71, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). Since the relief available under Title VII is extensive enough to include the remedy approved by the majority in this case,[3] the wiser course would be to base the finding of liability on that statute and to wait for a more appropriate opportunity to consider the reaches of section 1981. Since the majority does choose to rely upon section 1981, however, I wish to make it clear that I cannot accept its easy conclusion that a prima facie case under that statute does not require proof of discriminatory intent.

The majority asserts that the Supreme Court's opinion in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), does not address the question of whether cases brought under section 1981—like those brought directly under the Fourteenth Amendment—always require proof of discriminatory intent, or whether—as in Title VII cases—proof of discriminatory impact alone may be sufficient.[4] I agree. But *Washington v. Davis* serves at least to

2. Even if they had had proper standing, the plaintiffs could not have attacked defendants' pre-1972 procedures under Title VII since that statute first became applicable to state public employers on March 24, 1972. Since a stipulation states that the defendants abandoned their plan to make a discriminatory use of the 1972 exam on January 8, 1972, Title VII is arguably unavailable to the plaintiffs as a basis of liability in this case. In that event, and in light of the subsequent analysis in the text, the defendants would be absolved of all liability whatsoever. It appears, however, that the stipulated date may be in error, and in addition it seems to me that a persuasive argument can be made that the threat to use the 1972 examination in a discriminatory manner can fairly be construed as continuing after March 24, 1972, thus providing a legitimate basis for some relief to the plaintiffs.

3. "[T]he remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981 . . . ." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459, 95 S.Ct. 1716, 1719, 44 L.Ed.2d 295 (1975), *quoting* H.R.Rep. No. 92-238, 92nd Cong., 1st Sess. 19 (1971).

4. As the majority notes in footnote 7 of its opinion, few courts have had occasion to construe section 1981 in light of *Washington v. Davis*. Of those which have dealt with the issue explicitly, most have done so without analysis, e. g., *Kinsey v. First Regional Securi-*

remind us that improper intent may be an essential ingredient in some discrimination cases where the lower courts have heretofore thought otherwise. When it is necessary to decide such cases on the basis of authority other than Title VII or the Fourteenth Amendment, therefore, a most careful reconsideration of the role of discriminatory intent is in order.

The majority reasons that because both Title VII and section 1981 apply to employment discrimination cases, because the remedies available under these two statutes are "parallel or overlapping," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 & n.7, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), and because *Washington v. Davis* does not decide that intentional discrimination is required under section 1981, "there remains no operational distinction in this context between liability based upon Title VII and section 1981." This analysis is inadequate.[5]

That both statutes can apply to the same facts and that both may afford similar remedies is beside the point. The same can be said of Title VII and the Fourteenth Amendment, yet, after *Washington v. Davis*, there remains an essential "operational distinction" between them. The proper inquiry is whether the legislative history of section 1981 indicates that it *should* track the Fourteenth Amendment's standards of proof rather than those of Title VII. I believe that the history of section 1981 strongly suggests precisely that.

Because section 1981 is peculiarly linked to the Fourteenth Amendment, the stan-

ties, *Inc.*, 557 F.2d 830, 838 n.22 (D.C.Cir.1977), or under the assumption, rejected by us today, that *Washington v. Davis* did decide the section 1981 question. *E. g., League of United Latin Am. Citizens v. City of Santa Ana*, 13 FEP Cases 1019–20 (C.D.Cal.1976). The only post-*Washington v. Davis* cases I have located that shed any light on the problem support the position taken in this dissent. *Croker v. Boeing Co.*, 437 F.Supp. 1138 (E.D.Pa.1977); *Johnson v. Hoffman*, 424 F.Supp. 490, 493–94 (E.D.Mo. 1977).

Significantly, the Supreme Court vacated and remanded the Tenth Circuit's decision in *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431 (10th Cir. 1975), *cert. granted, vacated, and remanded*, 426 U.S. 944, 96 S.Ct. 3161, 49 L.Ed.2d 1181 (1976), in which it was held that "the measure of a claim under the Civil Rights Act [*i. e.*, section 1981 *et seq.*] is in essence that applied in a suit under Title VII of the Civil Rights Act of 1964." 526 F.2d at 438. *Stover* did not involve Title VII, but turned on sections 1981, 1983, and 1985, suggesting that the Supreme Court may well believe that constitutional standards apply in section 1981 cases. This is the interpretation placed on the Supreme Court's action by the Tenth Circuit panel that originally decided *Stover*, as evidenced by their treatment of the case on remand. *Chicano Police Officer's Ass'n v. Stover*, 552 F.2d 918, 920 (10th Cir. 1977).

5. The majority's analysis is not helped by the string of citations offered in support of the propositions that section 1981 has been applied "to bar discrimination in employment," and that Title VII principles are a "benchmark" in discrimination cases. The burden of these cases is that section 1981 provides a cause of action for private acts of employment discrimination and that it was not implicitly repealed by Title VII. I do not disagree. If any of these decisions arguably imply that section 1981 and Title VII are equivalent with respect to the required elements of a prima facie case, it should be noted that all but two of them were rendered prior to *Washington v. Davis*, and of those, none offers any analysis of the critical issue of discriminatory intent which the opinion in that case revived as a major factor in discrimination law. The two post-*Washington v. Davis* decisions, *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977) and *McCormick v. Attala County Bd. of Educ.*, 541 F.2d 1094 (5th Cir. 1976), make no reference to *Washington v. Davis* or to the issues it discussed. Thus, none of these cases contributes much to the resolution of the issue at hand.

Actually, one of the Fifth Circuit cases relied upon by the majority, *Wade v. Mississippi Coop. Extension Serv.*, 528 F.2d 508 (5th Cir. 1976), undermines the majority's position. *Wade* specifically rejected the lower court's application to section 1981 of "the standard of proof established by the regulations implementing Title VII" and held that "[u]nder the law of this circuit, . . . *public employment tests are to be judged under a constitutional standard in suits brought under 42 U.S.C.A. §§ 1981, 1983.*" *Id.* at 518 (emphasis added). The court in *Wade*, although it had the foresight to recognize that *Washington v. Davis*, then pending before the Supreme Court, could affect its understanding of the issues in the case before it, *id.* at 518 n.7, unavoidably lacked the wisdom later supplied by *Washington v. Davis* that purposeful discrimination is one element of the constitutional standard. But of interest here is the Fifth Circuit's recognition that section 1981 tracks the Constitution, not Title VII, in its standards of proof.

dards pertaining to that amendment should also control section 1981. Of course, Title VII also depends in part upon the Fourteenth Amendment for its validity.[6] Title VII, however, was intentionally structured to rest upon as many other constitutional bases as possible.[7] It is otherwise with section 1981. Section 1981 originated in two earlier statutes: section 1 of the Civil Rights Act of 1866, 14 Stat. 27, and section 16 of the Voting Rights Act of 1870, 16 Stat. 144. *Runyon v. McCrary, supra*, 427 U.S. at 168–70 n.8, 96 S.Ct. 2586. The 1866 Act is generally regarded as a "Thirteenth Amendment statute," *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422, 437–38, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), but it has also been found to rely upon the Fourteenth Amendment. In fact, part of the motivation behind the congressional support of the Fourteenth Amendment was to eliminate doubts about the constitutionality of the 1866 Act. *Id.* at 436, 88 S.Ct. 2186. The second root of section 1981, section 16 of the Voting Rights Act of 1870, is clearly a "Fourteenth Amendment statute," *Runyon v. McCrary, supra*, 427 U.S. at 195–202, 96 S.Ct. 2586 (White, J. dissenting); its legislative history demonstrates that its precise purpose was to implement the congressional powers created by that Amendment. *Id.*

The significance of this is that section 1981 enjoys a unique historical and conceptual relationship to the Fourteenth Amendment which is not shared by Title VII.[8] Consequently, it is quite proper to assume, absent a contrary holding by the Supreme Court, that the standards for establishing a prima facie case of discrimination under section 1981 and the Equal Protection Clause of the Fourteenth Amendment should be the same: there must be proof of discriminatory intent.

Other factors reinforce this conclusion. Interpreting section 1981 to require discriminatory intent is consistent with the Su-

6. *E. g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 447–48, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (1972 amendments to Title VII rely upon Fourteenth Amendment). With respect to section 1981, see subsequent text.

7. In his June 19, 1963 message to Congress, President John Kennedy submitted a proposed bill which developed into the Civil Rights Act of 1964 and which contained the embryo of what is now Title VII. The proposed bill was expressly made to rely upon

> the exercise by Congress of the powers conferred upon it to regulate the manner of holding Federal Elections, to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.

H.R.Doc. No. 124, 88th Cong., 1st Sess. 14 (1963). That the present version of Title VII rests on more than the Civil Rights Amendments may also be seen in the deliberate inclusion of interstate commerce concepts in Title VII's definitions, signifying a reliance upon the Commerce Clause. 42 U.S.C. § 2000e(b) (e), (g) & (h). *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249–50, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Title II of Civil Rights Act of 1964 valid under the Commerce Clause).

Several courts of appeals, including our own, have found that Title VII extends beyond the reach of the Equal Protection Clause. *E. g., Berg v. Richmond Unified School Dist.*, 528 F.2d 1208, 1212 n.8 (9th Cir. 1975), *cert. granted*, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788 (1977); *Satty v. Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975), *cert. granted*, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788 (1977); *Communications Workers v. American Tel. & Tel. Co.*, 513 F.2d 1024, 1031 (2d Cir. 1975), *cert. granted, vacated and remanded*, 429 U.S. 1033, 97 S.Ct. 724, 50 L.Ed.2d 744 (1977). Although the holdings in these cases that the exclusion of pregnant women from certain insurance and other employment benefits have been undermined or put in doubt by *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), the *Gilbert* decision itself does not question the idea that Title VII invokes congressional powers beyond those derived from the Fourteenth Amendment. Rather, *Gilbert* simply holds that the exclusion of pregnancy benefits from an employer's disability insurance plan does not constitute a sex-based discrimination capable of invoking either Title VII or the Fourteenth Amendment. *Id.* at 136, 97 S.Ct. 401.

8. As *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), makes clear, section 1981 is also very closely tied to the Thirteenth Amendment. *Washington v. Davis* did not decide whether discriminatory intent is required in Thirteenth Amendment cases. I think that it is, but any uncertainty in this assumption merely underscores that the majority's decision to delve into section 1981 is unwise.

preme Court's statement in *Jones v. Alfred H. Mayer Co.*, *supra*, that Congress intended section 1 of the Civil Rights Act of 1866—the source of what is now section 1982 as well as one source of section 1981—"to prohibit *all racially motivated* deprivations of the rights enumerated in the statute . . . ." *Id.* 392 U.S. at 426, 88 S.Ct. at 2196 (emphasis partly added). That racial motivation was originally meant by Congress to be a requirement in actions under the 1866 Act is further suggested by section 2 of the Act which imposes criminal penalties upon anyone who, under color of law, deprives another of the rights protected by section 1 "by reason of his color or race." 14 Stat. 27.[9]

In addition, there are practical reasons for requiring proof of discriminatory intent in section 1981 cases, but not in Title VII cases. Title VII is part of a complex statute; together with its accompanying administrative regulations it identifies with particularity the conduct it proscribes and imposes a course of administrative remedies that must be exhausted before the jurisdiction of the courts may be invoked. 42 U.S.C. § 2000e–5; 29 C.F.R. §§ 1601.1 *et seq.* Because these barriers tend to eliminate claims that are frivolous or suffering from obvious legal or factual defects, it is not unreasonable to provide that a prima facie case may be established without a showing of discriminatory intent.

Section 1981 is a very different statute. Its language is both brief and sweeping in scope, and it does not have the screening mechanism provided by a requirement of the exhaustion of administrative remedies. The section 1981 screening mechanism, as in actions proceeding directly under the Fourteenth Amendment, is the required demonstration of discriminatory intent.

Indeed, because section 1981 can probably be invoked in a great many cases brought directly under the Fourteenth Amendment, the consequence of judicially creating a less demanding standard for section 1981 than for the Fourteenth Amendment might often be to circumvent the holding in *Washington v. Davis* altogether. In the vast array of cases such as the one before us now and *Washington v. Davis* itself, where Title VII does not apply but Section 1981 and the Fourteenth Amendment do, one could easily avoid the intent requirement of the Amendment by simply pleading section 1981.[10] *See Croker v. Boeing Co.*, 437 F.Supp. 1138 (E.D.Pa. 1977).

Finally, an observation made by the Supreme Court in *Washington v. Davis* is relevant here. The Court was concerned about the problems that might arise if the Fourteenth Amendment could be invoked upon a mere showing of disproportionate racial impact:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

9. In addition, the original draft of the 1866 Act, as introduced by Senator Trumball of Illinois, prohibited "discrimination in civil rights or immunities . . . *on account of* race, color, or previous condition of slavery . . . ." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 288, 96 S.Ct. 2574, 2582, 49 L.Ed.2d 493 (1976) (emphasis added).

10. In *Washington v. Davis*, the plaintiffs did plead section 1981. The defendants here argue that in that decision section 1981 was implicitly held to require a showing of discriminatory intent. The plaintiffs argue that the opposite implication exists. Both sides have a certain logical basis, but a close reading of the Supreme Court's opinion convinces me, as it does the majority, that *Washington v. Davis* simply does not consider the standards governing section 1981.

426 U.S. at 248, 96 S.Ct. at 2051 (footnote omitted) Section 1981, extending as it does far beyond "the field of public employment" to the expansive realm of both public and private contractual relationships, might well precipitate many of these same consequences if proof of discriminatory intent is not required.

For these reasons I would base defendants' liability for the use of the 1972 examination on Title VII alone. The majority's reliance on section 1981 is ill-advised because it is both unnecessary and incorrect.

C. *The Scope of the Remedy*

Even if the plaintiffs have established a Title VII violation with respect to the defendants' use of the 1972 written test results, however, that violation does not necessarily justify the imposition of minority hiring quotas on the defendants. The use of quotas must be carefully weighed. As the Supreme Court stated in *Griggs v. Duke Power Co., supra,* 401 U.S. at 430–31, 91 S.Ct. at 853:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

In this case the trial judge ordered that 20 percent of all newly-hired firemen be black and that 20 percent be Mexican-American, compared to the respective proportions of those minorities in the population of 10.8 percent and 18.3 percent. Imposition of this hiring quota may well result in discrimination against equally or better qualified applicants solely on account of their race. Here, for example, a native American Indian, Asian-American, Hungarian-American or Polish-American may not be hired in order to provide a job for a black or Mexican-American. While quotas are sometimes necessary to correct past discrimination against certain groups, the possible prejudicial effects upon others must be weighed carefully by the district court.[11]

In civil rights cases, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). *Accord, Milliken v. Bradley,* 418 U.S. 717, 744, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). In fashioning remedies under Title VII, it is therefore essential to identify accurately the nature of the violations that have occurred. Here, the district judge believed he had properly found the defendants liable not only for their thwarted attempt to use the 1972 exam results in a discriminatory manner, but also for their use in earlier years of the examinations which actually produced the racial imbalance in the fire department's work force. It is obvious that the quotas were imposed to remedy that racial imbalance,[12] and thus that in

11. *See McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) (section 1981 and Title VII prohibit racial discrimination in private employment against white persons as well as against nonwhites). *Cf. Franks v. Bowman Transp. Co.,* 424 U.S. 747, 780–81, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (Burger, C. J., concurring and dissenting) (white employees injured by award of retroactive seniority to nonwhites may petition for equitable relief on their own behalf); *Weber v. Kaiser Alum. & Chem. Corp.,* 415 F.Supp. 761 (E.D.La.1976) (Title VII prohibits discrimination against white employees; private employment context).

I agree, of course, that equitable relief to rectify past discrimination will often impose burdens on those innocent of any discriminatory activity. *Franks v. Bowman Transp. Co., supra,* 424 U.S. at 773–79, 96 S.Ct. 1251. But, as I explain in the subsequent text, relief appropriate to the violation in this case requires the imposition of no such burdens.

12. In his conclusions of law, the district judge stated:

> [I]t appears that unless the Court orders accelerated hiring at the Los Angeles County Fire Department, there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the presently existing

devising his hiring order, the district judge relied heavily upon his conclusion that the defendants were liable for their use of the pre-1972 examinations. For the reasons that follow, this reliance was misplaced.

The majority concedes that none of the defendants' examination procedures except the aborted attempt to use the 1972 exam results in a discriminatory manner were properly before the district court. I agree. The complete absence of standing on the part of any plaintiff to contest the earlier procedures makes them legally indistinguishable from the act described in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), which could have been, but was not, properly brought before a federal court:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Id. at 558, 97 S.Ct. at 1889.[13] Therefore, the district court was not entitled to treat the pre-1972 examination procedures as substantive violations to be corrected, but only as "relevant background" to the narrow issues properly before him.

Moreover, even if the pre-1972 examinations could be properly considered by the district judge as background, their relationship to the defendants' Title VII violation militates against taking them heavily into account. The remedial obligation of the district court was first and foremost to grant relief for the violations of law properly found to exist. It is true that judicial remedies sometimes attempt to correct past discrimination as well, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), but this is because present violations often "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co., supra*, 401 U.S. at 430, 96 S.Ct. at 853.

The Title VII violation in this case had no such effect. Both the majority and I agree that the defendants are liable for nothing more than devising a plan—never carried out—which would have had a discriminatory impact. The plaintiffs concede in their brief that in fact "the post-March 1972 discrimination . . . had no 'effects.'" Because the racial imbalance of which the plaintiffs complain was neither aggravated nor perpetuated by the defendants' actionable discrimination, the liability of defendants for that limited threat of discrimination does not create a proper platform from which to reach back to correct the racial imbalance.[14]

Even under the majority's view of this case, a remand is essential. Had the district judge initially found the defendants liable for as little as this court does today, I cannot believe he would have imposed the drastic remedy which the majority now sustains. It is conceded that the only objectionable "use" of a written examination by the defendants was their intent to narrow the field of applicants to the top 544 scorers

> effects of *past discrimination* within a reasonable period of time . . . .
> (Emphasis added).

13. It is not only the standing issue that made it improper for the district court to rely upon the pre-1972 procedures in fashioning its remedial order, but also the fact that even a plaintiff with standing could probably not have shown them to be illegal. Since Title VII first became applicable to the defendants on March 24, 1972, liability for the defendants' conduct previous to that date must be evaluated under section 1981. But that statute, as I explain above, appears to require proof of a discriminatory intent, and the district judge explicitly found as a matter of fact that such intent was lacking here.

14. "At the threshold we observe that Title VII speaks only to the future. The only justification for a backward gaze is in determining whether a *present* employment practice may, in fact, perpetuate past discrimination." *EEOC v. University of N. M.*, 504 F.2d 1296, 1301 (10th Cir. 1974).

on the 1972 exam. This plan was made only after an apparently nondiscriminatory system (interviewing randomly selected applicants who passed the 1972 exam) was enjoined in a state court proceeding. It came when the defendants were under the great stress of needing to fill mounting vacancies and at a time when they were affirmatively working to end prior discriminatory practices.

In light of these facts, I would reverse and remand to the district court for reconsideration of the appropriateness of quotas in this case.[15] It is clear to me that the court can fashion an effective order prohibiting any discriminatory use of the 1972 examination directly without imposing quotas.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VAN DAVIS, et al., *Plaintiffs-Appellants,* vs. COUNTY OF LOS ANGELES, et al., etc., *Defendants-Appellees.*	No. 73-3008
VAN DAVIS, et al., *Plaintiffs-Appellees,* vs. COUNTY OF LOS ANGELES, et al., etc., *Defendants-Appellants.*	No. 73-3009

OPINION

[October 20, 1976]

Appeal from the United States District Court
for the Central District of California

Before: TUTTLE,* HUFSTEDLER and WALLACE, Circuit Judges.

TUTTLE, Circuit Judge:

This suit was brought on behalf of all past, present and future black and Mexican-American applicants for positions as firemen with the Los Angeles County Fire Department, alleging that the defendants Los Angeles County, the Board of Supervisors of the County and the County Civil Service Commission had been guilty of past discrimination in hiring in violation of the Fourteenth Amendment, the Civil Rights Act of 1866, 42 U.S.C.

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*Honorable Elbert P. Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.

§§1981, 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*[1]

The district court found that the L.A. County Fire Department employed blacks and Mexican-Americans grossly out of proportion to their number in the population of L.A. County. The court further found that the Fire Department, despite its admitted knowledge of its prior discriminatory practices and its bad reputation as an employer in the minority community, failed to undertake any effective positive steps to eradicate the effects of prior discrimination. Accordingly the court ordered accelerated hiring of racial minorities in a ratio of one black and one Mexican-American applicant hired for each five white applicants hired until the effects of past discrimination had been erased.[2]

Despite the fact that the Mexican-American population of L.A. County was approximately double the size of the black population, the district court ordered identical accelerated hiring due to its finding that the Fire Department's 5 foot, 7 inch height requirement for job applicants was a valid requirement for employment, and that this height requirement had the effect of eliminating 45% of the otherwise eligible Mexican-American applicants from consideration.

The plaintiffs appeal the trial court's finding that the 5'7" height requirement is valid and could therefore be used in limiting the relief available to the Mexican-American members of the plaintiff class. The defendants cross-appeal the trial court's order of accelerated hiring. We affirm the district court's order of accelerated hiring to cure past racial discrimination; we disagree with the court's determination that the 5'7" height requirement has been sufficiently validated by the defendants, and accordingly we reverse and remand for reconsideration of the proper ratio of accelerated racial hiring to be ordered.

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[1]Jurisdiction was based on 28 U.S.C. §1343. The additional allegations of racial discrimination in promotions were abandoned prior to trial.

[2]Data introduced by the plaintiffs showed that this 1-1-5 ratio, given the present rate of new hiring, would produce a work force of minority firemen in proportion to the number of minority persons in the workforce by 1979 for blacks and 1983 for Mexican-Americans.

I. PROCEDURAL DEFENSE

Despite a minority population of approximately 29.1% in L.A. County, only 3.3% of the firemen employed by the defendants were black or Mexican-American at the time of trial. The defendants do not, and indeed cannot, dispute the trial court's finding that these data establish a prima facie case of racial discrimination. This Court has recognized that such statistics can prove past racial discrimination. *United States v. Ironworkers Local 86*, 443 F.2d 544, 550 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971).[3] Unable to contest the indisputable legal effect of these data, the defendants pose a number of procedural defenses all involving the claim that whatever discriminatory practices they might have been guilty of in the past have been ended. Specifically the defendants argue: (1) that the plaintiffs lacked standing to assert the interests of the class aggrieved by past discriminatory practices; (2) that the discriminatory practices complained of occurred prior to March 1, 1972, the date on which Title VII became applicable to cities and municipalities; and (3) that the discriminatory practices complained of occurred prior to the three year statute of limitations on the plaintiffs §§1981 and 1983 claims.[4]

These three arguments are all based on the same undisputed fact: the last time the defendants administered a test to job

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[3]The cases holding that statistics alone may prove a prima facie case of racial discrimination in employment, thereby shifting the burden to the defendants to justify the racial imbalance, are by this time legion. *See, e.g.*, United States v. Hayes International Corp., 456 F.2d 112 (5th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Masonry Contractors Ass'n., 497 F.2d 871 (6th Cir. 1974).

[4]The plaintiffs do not dispute the fact that Title VII became applicable to municipalities on March 1, 1972. *See* 42 U.S.C. §2000e(a). Nor do they dispute the fact that their §§1981 and 1983 claims are governed by the state three year statute of limitations. *See* Mills v. Small, 446 F.2d 249 (9th Cir. 1971) *cert. denied* 30 L.Ed.2d 543 (1971). Because plaintiffs' complaint was filed on January 11, 1973, the occurrences complained of must have happened subsequent to January 11, 1970.

applicants which had discriminatory effect was August 1969.[5] Thus because none of the class representatives in this suit were unsuccessful applicants in 1969, and because the test was administered prior to the three-year cut off for the §§1981 and 1983 claims, and well before March 24, 1972, accordingly the defendants argue their past discriminatory actions cannot give rise to current liability. The district court found that the past discriminatory acts had continuing effect,[5a] thereby justifying present relief. We agree. In our view the defendants claim that because the 1969 examination was *administered* in 1969 it accordingly had *effect* only in 1969 is manifestly incorrect.

The 1969 examination was administered to a large group of applicants; the successful applicants who scored well on this examination and in the subsequent interview were certified as eligible candidates, and were placed on an eligibilty list for later employment as vacancies occurred in the ranks of the fire-

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[5]The defendants do not dispute the fact that this verbal aptitude test had discriminatory impact, and could not be validated under the requirements of Griggs v. Duke Power Co., 401 U.S. 424 (1971). Of the 244 blacks who took this test, 5 were hired; of the 100 Mexican-Americans, 7 were hired, while of the 1080 whites taking the test, 175 were hired. Thus while approximately 25% of the applicants were black or Mexican-American, based on the results of this test only 6.4% of the hires were minorities.

[5a]The trial court's Finding No. 6 contains the following language: "The accelerated hiring to be ordered by the court is based on all findings, including the following considerations: . . .

(b) It is in the public interest to accelerate the elimination of the racial imbalance at the Los Angeles County Fire Department *caused by the past discrimination of defendants.*

(c) It appears that unless the court orders accelerated hiring at the Los Angeles County Fire Department there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome *the presently existing effects of past discrimination* within a reasonable period of time."

Conclusion of Law No. 7 says:

> "In order *to eliminate the effects of past discrimination against blacks and Mexican-Americans, those effects being the currently existing racial imbalance in the workforce of the Los Angeles County Fire Department,* it is appropriate and constitutional to order the Defendants to engage in the hiring of blacks and Mexican-Americans on an accelerated basis as set forth in the Judgment herein. . . ." (Emphasis supplied).

men. The parties stipulated approximately 100 such vacancies occur each year. 187 applicants were placed on the eligibility list following the 1969 examination. Based on these facts, the district court found that the examination had effect past 1969, and we think this was certainly correct. While the plaintiffs failed to show that any candidate on this list was hired after March 24, 1972, it is obvious that most were hired after January 11, 1970. Thus despite the failure of the plaintiffs to prove that specific discriminatory acts occurred during the effective period covered by Title VII, it is clear that discriminatory hiring did take place within the three years prior to their §§1981 and 1983 claims.[6]

The defendants further argue that the district court lacked jurisdiction under either §§1981 or 1983. As to §1983 the defendants are clearly correct. A municipality is not a "person" suable under §1983[7] and thus the three municipal defendants are not subject to suit under §1983. *Monroe v. Pape*, 365 U.S. 167 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). No individual defendants were named in the suit, and thus the plaintiffs §1983 claim is barred.[8] §1981 is not subject to the same jurisdictional limitations: the language of the statute does not require that a defendant be a "person" before suit may be

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[6]We do not consider the plaintiffs' additional arguments that such factors as the defendants' bad reputation in the minority community or nepotistic word-of-mouth recruiting and counselling may, alone, constitute sufficient discriminatory practices as to establish a valid Title VII claim. The evidence on these points was extremely impressionistic and the district court did not rely on these theories.

[7]42 U.S.C. §1983 provides:

> "Every *person* who, under color of any statute . . . of any state . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress." (emphasis added)

[8]Individuals may be sued in their official capacity. *See* Harper v. Kloster, 486 F.2d 1134, 1138 (4th Cir. 1973); United Farmworkers of Florida Housing Project, Inc. v. City of Del Ray Beach, Florida, 493 F.2d 799, 802 (5th Cir. 1974); Sterzing v. Fort Bend Independent School District, 496 F.2d 92, 93 n.2 (5th Cir. 1972). As the plaintiffs did not allege federal question jurisdiction under 28 U.S.C. §1331, their Fourteenth Amendment claim does not stand apart from their §1983 claim.

brought.[9] Indeed, §1981 speaks only of the rights of the person denied the opportunity to make a contract due to his color—it doesn't attempt to specify who may be sued under its provisions. The construction the Supreme Court placed on the term "person" in *Monroe v. Pape* and *City of Kenosha v. Bruno* as it is used in §1983 was based entirely on the legislative history of that section, which was passed by the Congress entirely separately from §1981. In our view the statutory construction of §1983's use of a specific word does not constitute a blanket prohibition against civil rights suits against municipalities based on other code sections which don't even contain the same limiting language.[10]

In our view there is no operational distinction in this case between liability based on Title VII and §1981. §1981 has been construed to bar discrimination in employment by every Circuit which has considered the question. *Waters v. Wisconsin Steel Works of International Harvesters Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied* 401 U.S. 948 (1971); *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Long v.*

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[9]42 U.S.C. §1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every state . . . to make and enforce contracts . . . enjoyed by white citizens. . . ."

[10]Arunga v. Weldon, 469 F.2d 675 (9th Cir. 1972) might be read as applying the jurisdictional limits of §1983 to all civil rights sections. This two paragraph per curiam does not explain the reasons for such a holding, if that was in fact the basis for the holding, and we are reluctant to infer such a broad and sweeping holding from it. After circulating this opinion among all the members of this Court, this panel has been authorized to announce that to the extent this opinion is inconsistent with *Arunga*, this latter opinion is the preferred view of the majority of the members of this Court, as stated in Sethy v. Alameda Co. Water District, ___ F.2d ___ (9th Cir., *en banc*, 1976) [No. 73-1852 et seq. slip op'n Sept. 30, 1976.]

Ford Motor Co., 496 F.2d 500 (6th Cir. 1974).[11] This line of authority is so well-established the defendants do not even attempt to dispute the applicability of §1981 to employment discrimination. We join the seven other Circuits which have considered the question and hold §1981 is available as a remedy against employment discrimination based on color.

Accordingly, we believe the district court properly found the defendants guilty of employment discrimination. Despite the fact they conceded that the discriminatory effects of the verbal aptitude test they used were known even prior to the giving of the examination in 1969, the results of this examination had continued discriminatory effect as the 187 applicants hired after 1970 were employed on the basis of their success with the test. The defendants thus practiced discrimination in hiring which extended into the three year span subject to liability based on the plaintiffs' §1981 claim. As the named plaintiffs were applicants for positions during this period, the fact that they had not previously applied in 1969 is irrelevant, and accordingly they were proper class representatives.

II. THE 5 FOOT, 7 INCH HEIGHT REQUIREMENT

Among the practices of the defendants which the plaintiffs challenged was the 5'7" height requirement. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) the Supreme Court unanimously held that Title VII forbids the use of employment tests which have discriminatory effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question." 401 U.S. at 432. This burden arises only after the challenger proves that the tests in question have the effect of selecting applicants for employment or promotion in a racial pattern significantly different from that

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[11] *See generally* Comment, Racial Discrimination and Employment Under the Civil Rights Act of 1866, 36 *U.Chi.L.Rev.* 615 (1969); Herbert and Reischel, Title VII and the Multiple Approaches to Eliminating Employment Discrimination, 46 *N.Y.U.L. Rev.* 449 (1971); Peck, Remedies for Racial Discrimination in Employment, 46 *Wash.L. Rev.* 455 (1971); *Larson*, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment, 7 *Harv. Rights—Civ. Lib. L. Rev.* 56 (1972).

of the pool of applicants. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). Discriminatory tests are impermissible unless shown "by professionally acceptable methods," *Albemarle Paper Co. v. Moody,* 43 LW 4880, 4888 (1975) to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 20 C.F.R. §1607.4(c), EEOC Guidelines.[12]

Here there can be no question that the 5'7" height requirement has discriminatory impact. The parties stipulated that 45% of the otherwise eligible Mexican-American applicants are excluded by the requirement.[13] The defendants further conceded that no scientifically approved test has been utilized to determine whether the height requirement is in fact job related. The only testimony in the record on point is that of Chief Stanley E. Barlow, himself only 5'8", who testified that he believed a smaller man might have difficulty working with taller men in removing long ladders and other equipment, and might have a slower reaction time in climbing on and off equipment. Chief Barlow conceded that in the past firemen under 5'7" have been able to function without impairment due to their height.[14]

It seems clear to us that this testimony falls far short of validating a height requirement which had a serious impact in restricting Mexican-American employment in the County Fire

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[12]These EEOC Guidelines were recently approved by the Supreme Court in Albemarle Paper Co. v. Moody, 43 LW 4880 (1975) as providing standards by which employment requirements may be validated.

[13]We accordingly note that the continuing use of this height requirement would constitute a continuing violation of Title VII and would provide a basis for relief under that section even were §1981 not available. We do not suggest that the validation requirements of Title VII and §1981 are different, however. We believe Title VII validation standards may also be applied in §1981 cases.

[14]These shorter firemen were employed during World War II when the standard was relaxed, and when firemen of other cities automatically joined the L.A. County Fire Department when their employing cities were annexed by L.A. County.

Department. The district court erred in finding that the County had proven that the height requirement was job related.[15]

III. AFFIRMATIVE RELIEF

The defendants contest the affirmative relief ordered by the district court. As this Court has noted,

> "There can be little doubt that where a violation of Title VII is found, the court is vested with broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the non-existence of future barriers to the full enjoyment of equal job opportunities by qualified black employees."

United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971). We do not believe the court lacks equal power under §1981 to order relief.

> "In fashioning an appropriate remedy for employment discrimination, Congress has granted courts plenary equitable power under both Title VII . . . and section 1981."

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 243 (5th Cir. 1974). Although the decided cases have primarily involved either Title VII or §1983, and not §1981, we do feel the vast case law under both sections approving affirmative relief is directly applicable here. No other case we have found has involved the same odd factual pattern where only §1981 is available to remedy employment discrimination, and we see no reason to limit the relief available under §1981 merely because in the past §1981 and Title VII have been read in tandem. *See, e.g., Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1975), *cert. denied* ..... U.S. ..... (1975); *Pettway v. American Cast Iron Pipe Co., supra; Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974); *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). Similarly we

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[15]Similar height requirements have been recently struck down in other cases. See, Fox v. Washington, 43 LW 2468 (D.D.C. 4/22/75); Hardy v. Stumpf, 37 Cal. App. 3d 958 (1974). Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) upheld a height requirement for firemen, but only because the plaintiffs had failed to prove discriminatory impact upon Puerto Rican applicants.

note that Title VII and §1983 cases have frequently been cited as involving analogous principles in fashioning equitable relief. *See Carter v. Gallagher*, 452 F.2d 315, 329 (8th Cir. 1971) (*en banc* reversing in part panel opinion, 452 F.2d 315) *cert. denied* 406 U.S. 950 (1972); *Rios v. Enterprise Assn. Steamfitters Local 638*, 501 F.2d 622, 628 (2d Cir. 1974), and cases involving one statute have been cited in support of the relief ordered in cases involving the other.

Eight circuits, including this one, have considered and approved the use of accelerated hiring goals or quotas to eradicate the effects of past discrimination under either Title VII or §1983. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971) (Title VII); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974) (§§1981, 1983 and Title VII); *Rios v. Enterprise Assn. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974) (Title VII); *United States v. Masonry Contractors Assn.*, 497 F.2d 871 (6th Cir. 1974) (Title VII); *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974) (Title VII); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (*en banc*) (§1983; *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973) *affirming* 361 F.Supp. 1293 (D. Mass. 1973) *cert. denied* 416 U.S. 957 (1974) (Title VII); *Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973) (§1983); *Bridgeport Guardians, Inc. v. Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (Title VII); *Contractors Assn. of Eastern Pennsylvania v. Sec. of Labor*, 442 F.2d 159 (3d Cir. 1971) *cert. denied* 404 U.S. 854 (1971) (Title VII); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973) (*en banc*) (§1983); *United States v. Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973) (Title VII); *United States v. Wood, Wire and Metal Lathers International Union Local 46*, 471 F.2d 408 (2d Cir. 1973) *cert. denied* 412 U.S. 939 (1973) (Title VII); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (§1983); *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir. 1972) *cert. denied* 409 U.S. 851 (1972) (Title VII); *Carter v. Gallagher*, 452 F.2d 337 (8th Cir. 1971) (*en banc*) *cert. denied* 406 U.S. 950 (1972) (§1983); *United States v. IBEW Local 38*, 428 F.2d 144 (6th Cir. 1970) *cert. denied* 400 U.S. 943 (1970)

(Title VII); *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (Title VII).[16] While the defendants argue §703j of Title VII forbids the imposition of racial quota hiring, even were this to be an order premised on Title VII, we note this view has been uniformly rejected by the many courts which have considered the question.

We believe the district court properly exercised its discretion in ordering affirmative action to be undertaken to erase the effects of past discrimination. We do not believe that such relief may be limited to the identifiable persons denied employment in the past—for "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." *Carter v. Gallagher, supra*, 452 F.2d at 330.

> "Nor are remedial goals limited to any specific or prescribed form. The precise method of remedying past misconduct is left largely to the broad discretion of the district court. Goals have been expressed in terms of specific numbers or ratios . . . or percentages."

Rios v. Enterprise Assn. Steamfitters Local 638, supra, 501 F.2d at 631. While we remand because the district court expressly stated that the reason it ordered identical accelerated hiring of blacks and Mexican-Americans in equal ratios was because of the validity of the 5'7" height requirement, we do not necessarily believe a 1-1-1 ratio was incorrect (indeed, it was the relief originally requested by the plaintiffs), but the court should reconsider its order in light of our decision that the 5'7" height requirement is invalid.

The defendants finally argue that the imposition of an affirmative order to hire minority applicants is unnecessary. They argue in effect that they have already commenced and that they can be relied upon further to improve their hiring practices without the added impetus of a court order. Certainly the experience in the Fifth Circuit is useful in one regard—"protestations or

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[16]Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973) did not hold to the contrary, but upheld the district court's refusal to order the imposition of quotas within the facts of that case as not being an abuse of discretion.

repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practices sought to be enjoined will not be repeated." *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972). Here the record shows that the defendant had decided to use a similar verbal aptitude test to hire new candidates in 1973, but that this decision was revoked only upon being notified that this suit was to be filed. The Personnel Director of the defendants testified at length at the trial —and he acknowledged that as early as 1969 he was aware of the discriminatory impact of the aptitude test, and that he had recommended changes in recruitment, but that nothing was done on these recommendations. He further testified that the *only* reason the aptitude test wasn't used in 1973 was due to this suit. This record hardly supports the view that left to their own devices the defendants will devise an affirmative action program as effective as that of the district court's. We emphasized that this was not a close case, in the sense that the disproportion between minority candidates hired and the proportion of minority persons in the L.A. community was not grossly out of proportion. In a community of 28.5% minority population, only 3.5% of the candidates hired were blacks or Mexican-Americans. These data are hardly persuasive evidence of the defendants' good faith —even were such good faith relevant in fashioning relief.[17]

In sum, we believe the district court was wholly justified in deciding to impose affirmative hiring orders upon the defendants.

While it should be obvious to all, we nevertheless repeat the admonition that nothing said by this court is to be taken as a requirement that the defendants hire *any* unqualified applicant for the performance of these essential jobs.

AFFIRMED in part and REVERSED in part and REMANDED for reconsideration not inconsistent with this opinion.

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[17]In Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), a Title VII case, the Supreme Court rejected good faith as a defense— "Congress directed the thrust of the Act to the *consequences* of the employment practices, not simply the motivation." We believe good faith is equally inapplicable to §1981.

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

Discrimination in employment based upon race, creed or color is a practice inconsistent with the views and aspirations of nearly all Americans and clearly repugnant to the principles upon which our society is built. But even in rooting out such an evil practice, we are bound by certain procedural and jurisdictional limitations which may serve to protect the rights of others.

I think it is clear from the record that the plaintiffs' challenges to two of the three alleged illegal employment practices are barred by such a jurisdictional limitation: the named plaintiffs have no standing to attack the defendants' pre-1971 hiring procedures or the height limitation. While the plaintiffs may nevertheless have standing to challenge the post-1971 procedures, I question whether the imposition of minority hiring quotas is warranted given the limited scope of this issue. Because this is a question which should be resolved in the first instance by the trial judge, however, I would reverse and remand for reconsideration of the appropriate remedy in light of the limited standing of the plaintiffs in this case.

I. Standing to Challenge the Pre-1971 Written Tests

The district court held and the majority affirms that the plaintiffs made out a prima facie case of employment discrimination by proving that at the time the complaint was filed in 1973, only 3.3 percent of the firemen employed by the defendants were black or Mexican-American despite the fact that those minorities accounted for approximately 29.1 percent[1] of the population of Los Angeles County. These employment statistics are necessarily the result of the defendants' pre-1971 hiring practices since no firemen were hired thereafter until the complaint was filed. As the undisputed evidence showed, however, these procedures were abandoned in 1971 in an effort to correct the fire department's racial imbalance. None of the named plaintiffs made application before October 1971. Given these facts, the standing question is simple. Even in cases of racial discrimination, a showing of injury in fact or threat of injury

[1]The district court found that 10.8 percent of the population of Los Angeles County was black and 18.3 percent Mexican-American.

in fact from the allegedly illegal conduct is necessary in order to find standing. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972). Neither named plaintiffs nor members of the plaintiff class have suffered or were threatened with any injury in fact from the pre-October 1971 hiring procedures and they therefore have no standing to litigate the legality of those procedures.

The majority attempts to surmount this standing problem by arguing that the effects of the pre-1971 procedures continued until after the plaintiffs applied for employment in October 1971. I cannot accept this argument.

The villain of the pre-1971 procedures was a discriminatory written test used as a ranking device. All hiring was done from an eligibility list which was the final product of an examination process. The process began with the written test and a physical agility test and the top scorers were then selected for oral interviews. A total score was given each applicant, with the discriminatory written test having a 35 percent weighted value. The highest ranking candidates were certified for placement on the eligibility list from which vacancies were filled. When the list was exhausted, which usually happened in about two years, a new examination process would begin in order to produce a new eligibility list.

The last of these examination processes was initiated in 1969 by the administration of the discriminatory written test. The majority at page 4, *ante*, states that the district court found that the "1969 examination had continuing effect." The district court's Findings of Fact and Conclusions of Law do not support the majority's statement. The district court's language, fairly read, establishes what no member of the panel disputes: discrimination in 1969 and years prior thereto resulted in a "currently existing racial imbalance in the workforce of the Los Angeles County Fire Department."[2] That language does *not* establish that the discriminatory 1969 examination, or any prior discriminatory practice, adversely affected or "injured in fact" any of the named plaintiffs in their efforts to secure employment. Further, it is apparent from the first page of the Findings of Fact and

[2]See footnote 5a of the majority opinion.

Conclusions of Law that they were prepared by the attorneys representing the class plaintiffs. Thus, even if there were a finding as suggested by the majority, a careful examination of the record must be made to determine whether it would be supported. *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *Nissho-Iwai Co. v. Star Bulk Shipping Co.*, 503 F.2d 596 (9th Cir. 1974).

The supposed continuing effect of the 1969 examination apparently stems from the belief that the pool of applicants produced by this examination somehow affected the named plaintiffs' chances of being hired. However, the evidence does not support such a finding, even if made. I find nothing in the record indicating how many firemen were hired in the years 1970-72. There is a stipulation that there normally are 100 firemen hired per year. There is also testimony that the 1969 examination produced a 187-applicant eligibility list. But there were no findings made on hirings.

These facts may support a finding (if made) that some firemen were hired from the 1969 test list after January 11, 1970, and obviate the statute of limitations problem. But projections from these facts do not support a finding (which was never made) that any applicants from the 1969 examination list were hired after October 1971 when the named plaintiffs applied or, more importantly, after the January 1972 test when they became eligible for oral interviews and eventual certification for appointment. Indeed, assuming 100 hirings per year, the 187-applicant 1969 list would have been exhausted some time in early 1971.

The only other evidence in the record, though meager, supports this view of the facts. First, Mr. Nesvig, the Los Angeles County Personnel Director, was asked why in December 1972 they decided to interview only the top 544 scorers on the 1972 test even though they knew that would have a disproportionate detrimental effect on minorities. His response was: "We were desperate, in my opinion. . . . We had gone for almost two years [*i.e.*, since early 1971] with many vacancies . . . ." Later, Mr. Barlow, Chief Deputy Engineer and the number two man in the Los Angeles County Fire Department, was asked why they had not had any affirmative action since 1971. His response: "We did not have a list to hire off of, and our first class off of this [the

current] list, which examination [meaning the entire process from initial application to eligibility list] started in 1971, . . . was not started until April 9 [1973]."

Thus I think it clear that the pre-1971 procedures had no impact on the named plaintiffs in this case. They therefore have no standing to challenge those procedures and the district court did not have jurisdiction to consider the results of those examinations.

II. The Challenge to the Post-1971 Procedures

As noted above, prior to accepting applications for a new examination procedure in 1971, the entire procedure was changed. Since the named plaintiffs' applications were processed under these new procedures, they clearly have standing to litigate the legality of these procedures. Given the limited scope of the claim, however, I question the appropriateness of the sweeping injunctive relief granted.

The new procedures were to be as follows. Written tests were to be eliminated as a ranking device, but because of the large number of applicants (3500) and the relatively few job openings (33), some method had to be adopted to limit the number of applicants interviewed. Thus a new written test was designed in an attempt to eliminate cultural bias. The test was to be given and graded on a pass-fail basis for the sole purpose of screening out illiterates. Five hundred of the passing applicants were to be selected at random for oral interviews. This method eliminated the written test as a ranking device and gave every passing applicant an equal opportunity to be chosen for an oral interview. Ninety-seven percent of the applicants passed the written test; 1,885 were white, 170 black and 283 Mexican-American. The passing applicants were to be ranked solely on the basis of the results of the physical agility test and the oral interviews.

After administration of the written test, but before the random selection could be made, a lawsuit was filed in state court against the county, charging that the random selection process violated provisions of the county charter and civil service regulations requiring that selection for oral interviews be made on merit. The county was enjoined from using this method pending trial

on the merits. As a result, the examination process was halted for over two years and no interviews or physical tests were given and no eligibility list was certified.

As vacancies increased, the county fire department urged that the applicants, who by this time had been waiting for almost 18 months, be interviewed and an eligibility list certified. In desperation, the county Department of Personnel proposed to interview those applicants who had received the top 544 scores on the 1972 written test. Of this number, 492 were white, 10 black and 33 Mexican-American. The applicants were not to be ranked on the basis of the test results, however, and the interviews were not intended to eliminate the remaining applicants from consideration. The purpose was solely to expedite the hiring of sufficient firemen to meet the immediate, urgent requirements of the fire department.

The plaintiffs herein objected to this proposal. Upon learning of the complaint about to be filed in this action, the Director of Personnel abandoned the plan and implemented a new procedure whereby all of the passing applicants would be interviewed. The interviews commenced on January 20, 1973.

The plaintiffs filed this civil rights action naming as defendants the County of Los Angeles, the Board of Supervisors of the county and the Civil Service Commission. The complaint alleged racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983. The defendants completed interviewing all of the applicants by the end of March 1973 and certified an eligibility list. Of the top 315 applicants on this list, 210 were white, 39 black, 59 Mexican-American and 7 of other races (a total of 33.5 percent minorities). It was conceded by the plaintiffs that this examination and ranking procedure did not have a discriminatory impact on blacks and Mexican-Americans.

At the conclusion of the trial, the district court specifically found that the defendants had not interfered with affirmative action efforts designed to increase black and Mexican-American participation rates and that, to the contrary, several officials had engaged in efforts designed to increase minority representation in the fire department. The court further found that neither the defendants nor their officials had engaged in employment

practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment.

The court concluded, however, that the defendants had failed to take the necessary affirmative action to overcome the existence in the minority community of a discriminatory reputation and had engaged in the discriminatory employment practice of utilizing as a selection device non-validated written tests that had a disproportionate detrimental impact on blacks and Mexican-Americans. I agree with the majority that the subjective discriminatory reputation of the fire department cannot be the basis of a valid section 1981 claim.

The challenge to the use of the 1972 written test as a selection device is appropriate under section 1981. The claim is not mooted by the decision, prompted by the filing of this lawsuit, not to use the written test as a selection device but instead to interview all the applicants. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). There is nothing per se wrong with written employment tests; violation of section 1981 occurs only when the test is found to have a disproportionate detrimental impact on a minority group and has not been sufficiently validated as reasonably related to job performance. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Here, the district court found that the 1972 test violated the *Griggs* standard and I cannot conclude that the finding was clearly erroneous.

Even if the plaintiffs have established a section 1981 violation with respect to the defendants' use of the 1972 written test results, however, that violation does not necessarily justify the imposition of minority hiring quotas on the defendants. The use of quotas must be carefully weighed. As the Supreme Court stated in *Griggs:*

> Congress did not intend by Title VII [and inferentially by section 1981], however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers

> to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31.

In this case the trial judge ordered that 20 percent of all newly-hired firemen be black and that 20 percent be Mexican-American, compared to the respective proportions of those minorities in the population of 10.8 percent and 18.3 percent. Imposition of this hiring quota may well result in discrimination against equally or better qualified applicants solely on account of their race. Here, for example, a native American Indian, Asian-American, Hungarian-American or Polish-American may not be hired in order to provide a job for a black or Mexican-American. While quotas are sometimes necessary to correct past discrimination against certain groups, the possible prejudicial effects on others must be weighed closely by the district court.[3]

Thus, in a recent case very similar to this one, the Second Circuit reversed the district court's imposition of quotas as unwarranted. *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975). The case involved a challenge to the use of a discriminatory written test as a basis for promotion under a civil service system. The plaintiffs challenged the disproportionate impact only of the most recent test and made no claim of bad faith or intentional discrimination. The district court ordered the defendants to develop a validated non-discriminatory promotion procedure and imposed

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[3]*See* McDonald v. Santa Fe Trail Transp. Co., ___ U.S. ___ (June 25, 1976) (section 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, prohibit racial discrimination in private employment against white persons upon the same standards as racial discrimination against nonwhites). *Cf.* Franks v. Bowman Transp. Co., ___ U.S. ___, ___ (March 24, 1976) (Burger, C.J., concurring and dissenting) (white employees injured by award of retroactive seniority to nonwhites may petition for equitable relief on their own behalf).

I agree, of course, that equitable relief to rectify past discrimination will often impose burdens on those innocent of any discriminatory activity. Franks v. Bowman Transp. Co., *supra*, ___ U.S. at ___ (slip op. at 24-30). But the equitable relief should be tailored only to ameliorating the effects of past unlawful discrimination. *See id.*; note 4 *infra*.

promotion quotas to cure the effects of past discrimination. The Second Circuit upheld the order to develop a non-discriminatory procedure, but with respect to the imposition of quotas, held that "[i]n view of the limited scope of the issues framed in this class action . . . the imposition of permanent quotas to eradicate the effects of past discriminatory practices is unwarranted." *Id.* at 428 (footnote omitted).[4]

Here, the district judge obviously imposed the quotas to overcome the effects of the pre-1971 procedures because at the time the suit was commenced, there had been no hiring based upon the 1972 written test. Since the plaintiffs had no standing to challenge these pre-1971 procedures, I would reverse and remand the case to the district court for reconsideration of the appropriateness of quotas in this case. It is clear to me that the court can fashion an order prohibiting any discriminatory use of the 1972 test results directly without imposing quotas.

III. The Height Limitation

The only issue remaining is that pertaining to the height limitation. It comes to us by a curious route. The plaintiffs phrase their request for relief as follows:

> The only modification of the Judgment sought on this appeal is an increase in the Mexican-American hiring ratio, such increase to be ordered if there is a reversal by this Court of Appeal of the District Court's conclusion of law that the height standard is job-related and legal. Plaintiffs-appellants did not seek below and do not seek on this appeal, an order enjoining the use of the 5'7" height standard.

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[4]The court also noted that the quotas would unnecessarily nullify the state constitutional provisions requiring that promotions be made from the top three officers on the eligibility list, a decision which should be left to "the people speaking through their legislators." *Id.* at 429. *See also* Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976) (racial quotas in public employment layoffs not designed to remedy past discrimination are not authorized under section 1981 or Title VII); *accord,* Weber v. Kaiser Alum. & Chem. Corp., ... F. Supp. ... (E.D. La. 1976), 45 U.S.L.W. 2018 (Title VII in private employment context).

If the plaintiffs have never put the legality of the height limitation in issue, I do not see how the district judge abused his discretion in taking the height limitation into account in fashioning the remedy.

But even if the issue is before us, there is once more a complete absence of parties having standing to pursue it. None of the named plaintiffs are alleged to be under 5'7". To the contrary, it has been stipulated that all named plaintiffs are present employees or presently on an eligibility list. Since one of the requirements is a minimum height of 5'7", each of them must be at least that tall. Consequently, none of them have suffered an injury in fact from the alleged discriminatory practice.

Although the class was certified as "all present and future . . . Mexican-American applicants," some of whom may be less than 5'7" tall, the named plaintiffs cannot represent them because their interests are antagonistic. Fed. R. Civ. P. 23 (a)(3), (4). Applicants 5'7" and taller have an interest in limiting the number of their competitors by retaining the height requirement. This may be the reason why the plaintiffs did not ask that the height limitation be enjoined but merely now seek a larger hiring quota for Mexican-Americans in spite of it.

I would therefore reverse and remand.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 10-28-76—410

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VAN DAVIS, HERSHEL CLADY and FRED VEGA, individually and on behalf of all others similarly situated; WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAN, individually and on behalf of all others similarly situated,	)	CIVIL NO. 73-63-WPG
Plaintiffs,	)	JUDGMENT
vs.	)	
COUNTY OF LOS ANGELES: BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, and CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,	)	
Defendants.	)	

In accordance with the Findings of Fact and Conclusions of Law filed herein, it is on this day of July, 1973,
Ordered:

1. Defendants County of Los Angeles, Board of Supervisors of the County of Los Angeles, and the Los Angeles County Civil Service Commission ("Defendants") are permanently enjoined and restrained from engaging in any employment practice which discriminates on the basis of race or national origin against the class represented by Plaintiffs in this Action, that class being all present and future black and Mexican-American firemen applicants and firemen employees at the Los Angeles County Fire Department.

2. Defendants shall in good faith make all affirmative action efforts reasonably possible and necessary to increase the black and Mexican-American participation rates in the fireman workforce at the Los Angeles County Fire Department, until such time as those participation rates are commensurate with the black and Mexican-American population percentages of Los Angeles County.

3. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be blacks until such time as the percentage of blacks in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of blacks in the general popoulation of Los Angeles County.

4. A minimum of twenty per cent (20%) of all new employees employed in fireman positions at the Los Angeles County Fire Department, in any one year, beginning with July 1, 1973, shall be Mexican-Americans until such time as the

percentage of Mexican-Americans in the fireman workforce of the Los Angeles County Fire Department is equal to the percentage of Mexican-Americans in the general population of Los Angeles County.

5. Within thirty days of July first of every year, until such time as the black and Mexican-American participation rates at the Los Angeles County Fire Department are equal to the percentage of blacks and Mexican-Americans in the general population of Los Angeles County, Defendant County of Los Angeles shall file a report with the Court and counsel for Plaintiffs, or any person designated by such counsel; the report shall set forth the total number of new employees employed in fireman positions at the Los Angeles County Fire Department during the immediately preceding twelve month period, with a racial breakdown showing the number of blacks and the number of Mexican-Americans among such new employees. Further, such a report shall be made within thirty days of January 1, 1974, but shall not be required thereafter except on each July first, as provided for immediately above.

6. For purposes of this Order the race and/or national origin of each applicant and new employee shall be determined by a questionnaire to be completed by each applicant, giving each applicant an opportunity to designate whether he is "black", "Mexican-American", "Spanish-surnamed" shall be considered "Mexican-Americans." If it is determined by Defendants to be convenient administratively, the described questionnaire may be included as part of Defendants' application form for fireman positions. Counsel for Plaintiffs,

upon reasonable notice in writing, shall have access to all such applications and/or questionnaires.

7. Nothing in this Order shall in any way be deemed to require or encourage Defendants: (a) to employ any person not qualified for a fireman position with the Los Angeles County Fire Department; or (b) to in any way lower or refrain from increasing the standards for employment as firemen at the Los Angeles County Fire Department, provided such standards are reasonably related to the qualifications of potential firemen; all other provisions in this order are subordinate to the provisions of this paragraph numbered seven (7) and shall be subject to modification in the event of any conflict herewith.

8. Plaintiffs shall be awarded reasonable costs and attorneys' fees, to be paid by Defendant Los Angeles County. Counsel for Plaintiffs and counsel for Defendant County of Los Angeles, shall meet within ten days of entry of this Order to attempt to agree on the amount of such costs and attorneys' fees. If the parties reach such agreement, the parties shall submit to the Court, by stipulation, a proposed Order reflecting such agreement. If the parties are unable to reach such an agreement, Plaintiffs shall be entitled to move within twenty days of the date of this Order, on the regular motion calendar, for a determination by the Court of the appropriate amount of such costs and attorneys fees.

9. Paragraphs three (3) and four (4) of this Order are subject to the provision that employees hired pursuant to a merger with or acquisition of

other fire departments by Defendants, as well as employees hired into Defendants' regular training classes for new firemen, shall be considered "new employees"; this provision as to mergers and acquisitions however, does not require Defendants to hire forty percent blacks and Mexican-Americans in the year in which the merger or acquisition occurs, provided that:

(a) at least forty percent of the new employees hired into the training class or classes, during the year the merger or acquisition occurs, are black or Mexican-American; and in addition

(b) if the merger or acquisition involves a fire department of less than fifty fireman employees, within two years after the merger or acquisition occurs, Defendant shall have hired sufficient numbers of blacks and Mexican-Americans to meet the forty (40) percent requirements of paragraphs three (3) and four (4) of this Order; or if the merger involves a fire department of fifty to ninety-nine fireman employees, within three years after the merger occurs, Defendants shall have hired sufficient numbers of blacks and Mexican-Americans to meet the forty (40) percent requirements of paragraph three (3) and four (4) of this Order; or if the merger or acquisition involves a fire department

of from two-hundred and one to four hundred and ninety-nine fireman employees, within a proportionate number of years to those given immediately above, Defendants shall have hired sufficient numbers of blacks and Mexican-Americans to meet the forty percent requirements of paragraphs three (3) and four (4) of this Order; and

(c) provided further that subparagraph 9 (b) immediately above shall be deemed satisfied if Defendants select the alternative procedure of hiring in the next succeeding regular training class or classes after the occurrance of any merger or acquisitions, no less than fifty (50) percent blacks and Mexican-Americans, until such time as the over-all number of black and Mexican-American new employees hired after entry of this order equals forty percent of all new employees as required by paragraphs three (3) and four (4) of this Order; and

(d) provided further that the provisions of this paragraph number Nine (9) of this order shall not be applicable to any merger involving a fire department with more than 500 fireman employees, and if such a merger occurs any party may apply to this Court for such relief as the law

and the interests of justice may require in the situation.

10. Paragraphs three (3) and four (4) of this Order also are subject to the provision that employees of any race or national origin who fail to complete their probationary periods shall not be counted in determining whether the requirements of paragraphs three (3) and four (4) of this Order are bing met, provided that if in any year a disproportionately high number of blacks and Mexican-Americans are terminated prior to completion of their probationary period, Defendants shall be required to employ in the next succeeding training class, sufficient numbers of blacks and Mexican-Americans as is required to bring the percentage of blacks and Mexican-Americans employed in the two training classes, taken together, within the requirements of paragraphs three (3) and four (4) of this Order.

11. The Court shall maintain continuing jurisdiction of this action for such alterations or amendments to this Order or other relief as may appropriate, until such time as the black and Mexican-American participation rates in the fireman workforce of the Los Angeles County Fire Department are equal to the percentage of blacks and Mexican-Americans in the general population of Los Angeles County, at which time any party may apply to the Court for dissolution of this Order, and such dissolution shall be granted provided the black and Mexican-American participation rates at the Los Angeles County Fire Department are commensurate with the percentage of blacks and Mexican-Americans in the general population of

Los Angeles County.

Dated: 1973
Consented to, as to
form only, subject to
Intervenor's statement:

William P. Gray
United States District Judge

A. THOMAS HUNT
CARLYLE W. HALL, JR.
MARY D. NICHOLS
JOHN R. PHILLIPS
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APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VAN DAVIS, et al., Plaintiffs, vs. COUNTY OF LOS ANGELES, et al., Defendants.	CIVIL ACTION NO. 73-63-WPB FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, after trial, and based upon the Pre-Trial Order and all other papers filed herein, and all proceedings had herein, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant County of Los Angeles, Defendant Board of Supervisors of the County of Los Angeles, and Defendant Los Angeles County Civil Service Commission ("Defendants") are governmental entities established pursuant to the Constitution and laws of the state of California. Defendant County of Los Angeles performs the function among others, of providing fire prevention and fire protection services in certain districts located within the geographical boundries of Los Angeles County. Those services are performed through the Los Angeles County Fire Department. Intervening Defendant Los Angeles

County Fire Fighters, Local 1014 ("Intervenor") represents the firemen currently employed at the Los Angeles County Fire Department. Plaintiffs are blacks and Mexican-Americans who are either incumbent firemen at the Los Angeles County Fire Department or are present applicants for employment with that department.

2. The workforce at the time the complaint herein was filed, at the Los Angeles County Fire Department, consisted of 1,762 firemen, of whom nine (0.5%) are black and fifty (2.8%) are Mexican-American. In Los Angeles County, 10.8% of the inhabitants are black and 18.3% are Mexican-American. Defendants did not justify, at the trial or other proceedings herein, the paucity of black and Mexican-American firemen employees at the Los Angeles County Fire Department, as compared to the general population statistics for those minority groups.

3. Defendants have engaged in the following employment practices: (a) utilizing, until learning that this lawsuit was about to commenced, written tests as a selection devide for entry level positions at the Los Angeles County Fire Department, although such tests had a disproportionate detrimental impact upon black and Mexican-American applicants, and despite the fact that such tests have not been shown by a validation study to be related to or predictive of job performance statistically; and (b) failing and refusing to take necessary affirmative steps to overcome the existence in the black and Mexican-American communities of Los Angeles County of a reputation that the Los Angeles County Fire Department discriminates against blacks and

Mexican-Americans.

4. Defendants did not interfere with affirmative action efforts of individual persons designed to increase black and Mexican-American participation rates in the workforce of the Los Angeles County Fire Department.

5. Defendants' minimum height standard of 5'7" is substantially and reasonably related to job performance as a fireman.

6. The accelerated hiring to be ordered by the Court is based on all Findings, including the following considerations:

(a) it seems evident, as officials of Defendants testified at the trial, that Defendants will have no difficulty finding sufficient numbers of qualified Mexican-American potential firemen to fill the required ratios;

(b) it is in the public interest to accelerate the elimination of the racial imbalance at the Los Angeles County Fire Department caused by the past discrimination of Defendants;

(c) it appears that unless the Court orders accelerated hiring at the Los Angeles County Fire Department, there will not be sufficient hiring of blacks and Mexican-Americans as is necessary to overcome the presently existing effects of past

discrimination within a reasonable period of time;

(d) it appears that a Court order requiring accelerated hiring of minorities will aid those officials of Defendants who desire the elimination of the effects of past discrimination, in that such an order in all likelihood will make minority recruiting efforts more effective;

(e) because the Court concludes infra at conclusion Number Five (5) that Defendants' requirement that all applicants be not less than 5'7" in height is valid, appropriate and legal, and because it was stipulated herein that the 5'7" minimum heights requirement eliminates from consideration approximately 41% of the Mexican-American male population, it will be more difficult for Defendants to recruit sufficient numbers of Mexican-Americans on an accelerated basis is reduced.

7. Neither Defendants nor their officials engaged in employment practices with a willful or conscious purpose of excluding blacks and Mexican-Americans from employment at the Los Angeles County Fire Department. To the contrary, several of Defendants' officials engaged in efforts designed to increase the minority representation in the Los Angeles County Fire Department. Defendants did, however, intentionally engage in the employment

practices outlined above in Finding of Fact Number Three (3).

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action under Title 28, U.S.C. §1343, this being a suit in equity to redress the deprivation of rights guaranteed by the laws of the United States. Those rights are guaranteed by 42 U.S.C. §§1981 and 1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. ("Title VII").

2. This action may be maintained by the Plaintiffs as a class action pursuant to Rule 23 (a) and 23 (b)(1) and (2) of the Federal Rules of Civil Procedure. The class represented is all present and future black and Mexican-American applicants and employees at the Los Angeles County Fire Department.

3. Plaintiffs' cause of action is not barred by any applicable statute of limitations. United States v. Local 1, Ironworkers, 438 F.2d 679, 683 (7th Cir., 1971); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir., 1970), cert. denied 400 U.S. 943 (1970).

4. In cases involving discrimination based on race and national origin, "statistics often tell much, and Courts listen." Alabama v. United States, 304 F.2d 583, 586 (5th Cir., 1962), aff'd per curiam, 371 U.S. 37 (1962). In employment discrimination cases it consistently has been held that where employment statistics, such as those before the

Court, reveal a severe disproportion between the percentage of minority employees and the percentage of minorities residing within the relevant geographical area in which the employer is located, a prima facie case of discrimination is established. See, e.g. United States v. Local 86, Ironworkers, 315 F. Supp. 1202, 1236 (W. D. Wash., 1970), aff'd 443 F. 2d 544, 551 (9th Cir., 1971) cert. denied 404 U. S. 984 (1971); United States v. Hayes International Corp., 456 F. 2d 112, 120 (5th Cir., 1972); Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421, 426 (8th Cir., 1970). Defendants in this case did not rebut the prima facie case for Plaintiffs established by the statistics, cited in Findings of Fact Number Two (2).

5. Defendants' practice of dusqualifying all applicants for fireman positions who fail to fulfill the personal requirement of being at least 5'7" in height is valid, appropriate and not violative of 42 U. S. C. §§1981 or 1983, or of Title VII. Defendants are not required by law to conduct a scientific or empirical study showing whether there is a relationship between that height requirement and job performance.

6. Since Defendants did intentionally engage in employment practices which had the effect of discriminating against blacks and Mexican-Americans (Finding of Fact Number Seven (7)), Plaintiffs have satisfied the showing of intent required by law. Rowe v. General Motors, 457 F. 2d 348, 355 (5th Cir., 1972).

7. In order to eliminate the effects of past discrimination against blacks and Mexican-Americans, those effects being the currently existing racial imbalance in the workforce of the Los Angeles County Fire Department, it is appropriate and constitutional to order the Defendants to engage in the hiring of blacks and Mexican-Americans on an accelerated basis as set forth in the Judgment herein. United States v. Local 86, Ironworkers, 315 F. Supp. 1202, 1248 (W. D. Wash., 1970); aff'd 443 F. 2d 544 (9th Cir., 1971), cert. denied 404 U. S. 984 (1971); United States v. IBEW, Local 212, 472 F. 2d 643 (6th Cir., 1973); Carter v. Gallagher, 452 F. 2d 315 (8th Cir., 1972) cert. denied 406 U. S. 950 (1972).

8. Plaintiffs as prevailing parties are entitled to costs and reasonable attorneys fees against Defendant County of Los Angeles.

Dated: , 1973
Consented to, as to
form only, subject to
intervenor's statement

William P. Gray
United States District Judge

A. THOMAS HUNT
CARLYLE W. HALL, JR.
MARY D. NICHOLS
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